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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MAUREEN HANSEN, *et al.*,

Petitioners,

v.

WESTERVILLE CITY SCHOOL DISTRICT,
BOARD OF EDUCATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court below err in unholding the ruling of the District Court in granting summary judgment to the Respondents on Petitioners' claims of conspiracy under Section 1983, malicious prosecution, false arrest under state law, and violations of rights guaranteed to them by the First and Fourth Amendments to the United States Constitution?

2. Did the failure of the Court below to draw inferences from the facts presented in favor of the Petitioners, amount to an abridgement of the Petitioners' right to trial by jury as guaranteed by the Seventh Amendment to the United States Constitution?

LIST OF PARTIES

The parties in the proceedings and in this Court are Petitioners Maureen Hansen, Joseph McIntyre, Gordon Rood, Carl Huffman, Carolyn Ward, Raymond L. Brown, Sr., Sue A. Bresee, Jerry D. Bresee, Lou Waggoner, Jack P. Keller, and Margie Bean, the plaintiffs-appellants below, and Respondents Westerville City School District Board of Education, Don W. Miller, Ernest A. Husarik, J. Michael Hayfield, Board Member Debbie Collins, Board Member Dave Coffman, Board Member Donna Baker, Board Member Tom Fawcett, Officer R. Tiburzio, Officer T. Smith, Officer R. Bailey and Officer P. Ross, the defendants-appellees below.

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Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Sixth Circuit entered in the above entitled case on November 7, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, review of which is sought by this petition, is unpublished and is included on the appendix of this petition at page A-2. The opinions and orders of the United States District Court for the Southern District of Ohio, Eastern Division are unpublished and are included in the appendix at pages A-25 and A-39. The Order of the United States Court of Appeals for the Sixth Circuit is unpublished and is included in the appendix at A-1.

JURISDICTION

On July 17, 1989, Petitioners filed their Complaint in United States District Court for the Southern District of Ohio, Eastern Division against the Respondents pursuant to 28 U.S.C. §§ 1331 and 1342, alleging violations of 42 U.S.C. § 1983 et seq. to secure rights guaranteed by the First, Fourth and Fourteenth Amendments to the United States Constitution, and the Court's pendent state jurisdiction. On January 28, 1993 and February 19, 1993, the District Court issued Opinions and Orders which dismissed all of Petitioners claims. On February 25, 1993 and March 17, 1993, the Petitioners filed Appealed the District Court's rulings to the United States Court of Appeals for the Sixth Circuit. On November 7, 1994 the United States Court of Appeals issued its decision Reversing the District Court as to two claims and affirming the District Court as to all others. Subsequent to the filing of a request for rehearing en banc and request for a rehearing by Respondents Husarik and Hayfield, the Sixth Circuit Court of Appeals issued its Order denying the requests on January 19, 1995.

The jurisdiction of this Court to review the November 7, 1994 decision of the United States Court of Appeals for the Sixth Circuit is invoked under 28 U.S.C. 1254.

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but

upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Constitution of the United States, Amendment VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Constitution of the United States, Amendment XIV, Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners at all times pertinent hereto, were residents of the Westerville City School District located in the central Ohio area, and had independently opposed a May 3, 1988, property tax levy placed on the ballot by the Respondent Westerville City School District Board of Education. The levy was defeated.

In response to the May 3 defeat, the Respondent Board placed on a special election ballot for August 2, 1988, another property tax levy. Many of the Petitioners joined together prior to August of that year to oppose this second levy. As a group they took on the name "Citizens Against Tax Waste" and used the acronym CATW. Sixth Circuit Opinion. App. A-3. The August levy was also defeated.

In spite of these defeats, on August 22, 1988, the Board again voted unanimously to place the property tax levy back on the November 8, 1988, general election ballot. (Note: References herein to the Joint Appendix in the Sixth Circuit are delineated **Jt Apx**.) Jt Apx at 306 and 550-51.

During the year, a heightened public awareness of the levy had contributed to an increase in participation at bi-monthly public School Board meetings, especially from those citizens, many of whom were CATW members, that opposed the Board's pro-levy position. These meetings were televised on a local cable channel by students from Otterbein college located in Westerville, Ohio.

The Respondent Board of Education published a document entitled "Welcome To The Board Meeting." Jt Apx at 1073. This Board publication was handed out at the October Board meetings (Jt Apx at 566) and for many previous years. *Id* It described the "communication" period as follows:

> This place on the agenda is an opportunity for any citizen or organization to address the board orally or in writing. The board president will recognize anyone who wishes to comment and will allocate appropriate time for discussion. *Id.*, at 519.

In addition to the statement quoted above being present on the handout, the same wording appeared in the official Board Agendas

for this period in 1988 through the October 24, 1988, meeting, under the heading "Communication." Jt Apx at 574.

Board President Don Miller had also authored editorials that appeared in the local papers during this time period which indicated that Board meetings always provided opportunities for public comment and encouraged citizens to participate. Jt Apx at 570.

At the October 10, 1988, Board Meeting, the Board initiated a new procedure for those citizens who desired to participate in the Communications portion of the agenda. Anyone desiring to speak was requested to fill out a "speaker's slip," giving their name and the topic on which they wished to speak. Jt Apx at 501. The Board President then picked who would speak from this group of slips.[1]

On October 24, 1988, the Board of Education held its last public meeting before the November 8 general election.

The Petitioners and other tax-opponents and proponents went to this last meeting on October 24 to express their views. Prior to the communications portion of the agenda, Board President Don Miller announced that because of the large number of people that wanted to speak, he would lean toward those who had not spoken at previous meetings. Jt Apx at 511 & 527-28.

After 47 minutes of the Communication portion of the meeting had expired, Board President Miller announced that there would be time for two more speakers - Del Waggoner and Jack Sandman. Sixth Circuit Opinion App. A-6. Del Waggoner rose and spoke. After a 3 1/2 minute response to Mr. Waggoner's comments from Board President Miller, Petitioner Pete Huffman rose and said "Mr. Chairman. Mr. Chairman. I mention this 'Mr. Chairman' if you're using the parliamentary procedure, I ask you for a special privilege for two lousy minutes." See the videotape of the October 24, 1988, meeting, submitted as Joint Exhibit 2 [hereafter **JEx 2**] below and lodged with this Court, beginning at 1:26:00[2] and Jt Apx at 591.

Petitioner Pete Huffman was ruled out of order by Board President Miller. Superintendent Husarik gave a subtle hand signal

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[1] For many years prior to the institution of this procedure, people had raised their hands and the Board President had simply called on whomever he chose to speak by referring to them by name or physical description (i.e. their sex and what they were wearing). Jt Apx at 500.

[2] References are based on hour, minute and second counting from the beginning of the tape.

to Officer Tiburzio, who entered the meeting room and took out Petitioner Huffman. He was arrested and charged with "Disturbing a Lawful Meeting." Jt Apx at 1086 and JEx 2 beginning at 1:26:36.

Another CATW leader, Gordon Rood, rose to address the Board in protest of how they were conducting the affairs of the district. Jt Apx at 1133. He was also ruled out of order by Board President Don Miller and Officer Tiburzio returned and removed Petitioner Gordon Rood from the meeting. Petitioner Rood was arrested and charged with "Disturbing a Lawful Meeting." Jt Apx at 1087-88 and JEx 2 beginning at 1:27:34.

Out in the foyer, two officers (Respondents Bailey and Smith) initially grabbed Petitioner Rood and purportedly attempted to handcuff him.[3] The two officers pulled Petitioner Rood's arms up painfully behind his back (Jt Apx at 1246-47) and pushed his face into the glass door. Jt Apx at 1229. Petitioner Rood struggled with the two officers because they were hurting him. Jt Apx at 1135. Other officers joined the altercation (*Id.*, at 1135 and at 1104) until Lieutenant Jones entered the foyer and told them to let Petitioner Rood up and he would come with them. Jt Apx at 1088. Petitioners Gordon Rood and Pete Huffman were taken to the jail next door. On the way to the jail, one of the officers "kept jabbing Gordon [Rood] in the kidney area with the butt of his nightstick to prod him along." Jt Apx at 1153. The two CATW leaders were booked and released. Petitioner Rood was additionally charged with "Resisting Arrest" by Officer Tiburzio. Jt Apx at 1088.

Back inside the meeting room, Petitioner Maureen Hansen waited until Jack Sandman had completed his comments and the Board had had a short discussion. She then went to the podium and asked to be heard. She was ruled out of order and asked to sit down. JEx 2 beginning at 1:39:00. Officer Tiburzio came in at the request of Dr. Husarik and took her out. She was not placed under arrest or charged with any criminal code violation.

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[3] None of the officers touched Petitioner Huffman during this period even though Officer Tiburzio later said that he called for backup before he approached the podium to talk with Petitioner Huffman because he didn't want to get hurt. Jt Apx at 1537. It is difficult to imagine Petitioner Huffman, a man of 63 years and moderate stature, hurting Officer Tiburzio, a large framed man well over six foot who was a weight lifter and former manager of a Nautilus club. Jt Apx 1509-10.

After another agenda matter was completed, Petitioner Lou Waggoner approached the podium and asked the Board to allow those who wanted to talk to do so at the end of the agenda. This request was denied. She was ruled out of order by President Miller and escorted out by Officer Tiburzio. Sixth Circuit Opinion at App. A-7. She, too, was neither charged nor arrested.

Out in the foyer, Petitioners Maureen Hansen, Margaret McIntyre, Lou Waggoner, Sue Bresee, Carol Ward and Margie Bean were threatened with arrest by Officer Tiburzio if they did not leave the building. Shortly thereafter, Petitioner Jack Keller was also threatened with arrest by Officer Tiburzio as he tried to re-enter the meeting room. He too left the building. Petitioner Raymond L. Brown, Sr. was told he could not go back into the meeting by an unidentified Westerville police officer.

On January 30, 1989, Petitioner Gordon Rood was charged with another count of "Disturbing A Lawful Meeting" stemming from comments he made at the September 12, 1988 Board Meeting. The complaint was signed by Board President Miller (Jt Apx at 873) supposedly on the advice of James J. Fais, Chief Prosecutor for the City of Columbus. Jt Apx at 249.

On June 8, 1989, Petitioners Huffman and Rood were found not guilty on all charges stemming from the October 24 meeting after a seven day jury trial. On June 29, 1989, Gordon Rood was found not guilty of the second disturbing a lawful meeting charge by Franklin County Municipal Court Judge Richard S. Sheward. Jt Apx at 884.

Petitioners filed their Complaint against the Respondents on July 17, 1989, in the United States District Court for the Southern District of Ohio under U.S.C. §§ 1331 and 1343 pursuant to 42 U.S.C. § 1983 et seq. claiming violation of rights secured by the First, Fourth and Fourteenth Amendments to the United States Constitution in that Respondents conspired to prevent them from speaking and both arrested and threatened to arrest them for simply exercising their right to express their political opinions.

Additionally, Petitioners Rood and Huffman sought damages for false arrest and malicious prosecution under state law and Petitioners Huffman and Jerry Bresee sought damages for assault and battery. Jt Apx at 13-21.

Following motions for summary judgment filed on behalf of the "Police Defendants" on the one hand, and the "Board Defendants" on

the other,[4] the District Court sustained Respondents motions on January 28, 1993, and February 19, 1993, respectively, dismissing all of Petitioners claims. Petitioners filed a Notice of Appeal to the Sixth Circuit Court of Appeals on February 24, 1993, and an Amended Notice of Appeal on March 17, 1993. The Sixth Circuit Court of Appeals issued their initial decision on November 7, 1994, reinstating two of Petitioners claims and affirming the District Courts' decision with respect to the others. Following a petition for a rehearing en banc and a petition for rehearing filed by Respondents Husarik and Hayfield, the Sixth Circuit issued an order denying both petitions on January 19, 1995. Jt Apx at 8-11.

REASONS FOR GRANTING THIS PETITION FOR CERTIORARI

I. The Sixth Circuit did not follow this Court's rulings in *Celotex v. Catrett* and *Anderson v. Liberty Lobby, Inc.*

In rendering their opinion, the Sixth Circuit failed to properly follow this Court's standards for summary judgment as enunciated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), as well as the Sixth Circuit's own quoted standard from *EEOC v. Univ. of Detroit*, 904 F.2d 331, (6th Cir. 1990), at 334 that a court make "...all reasonable inferences in favor of the nonmoving party," (App. A-8).

Clearly, a nonmoving party is incapable of warding off a summary judgment attack if statements of the moving party are accepted when in opposition to those statements of the nonmoving party, and if logical and reasonable inferences from written and/or oral testimony of the moving party, in support of the nonmoving party's proposition(s), are clearly missed or ignored by the reviewing court in spite of that court's tacit acceptance of the proper standard.

II. The Sixth Circuit's ruling amounts to a denial of Petitioners' right to a trial by jury under the Seventh Amendment to the United States Constitution

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[4] See Footnote 1 in Opinion and Order of January 29, 1993 by the District Court, at App A-25.

The failure of a court to deduce inferences in favor of the nonmoving party may be fathomable in one or two minor instances, but the cumulative effect of erroneously interpreting evidence in numerous minor instances and/or one or more major instances is cataclysmic to the position of a nonmovant. It amounts to a denial of the right to a trial by jury - a right guaranteed to every citizen by the Seventh Amendment to the U.S. Constitution.

PETITIONERS' AMPLE RESPONSE

Motions for summary judgment necessarily turn on a review of facts submitted to the reviewing court. As this Court stated in *Celotex, supra*, the nonmovant is required to go "...beyond the pleadings..." and by "...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. However, no where in the *Celotex* decision is there a requirement that a non-moving party prove its case as if it were in trial.[5]

Clearly, the burden of the nonmovant at the summary judgment stage is that "...sufficient evidence be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson, supra,* at 249, quoting from *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) at 288-289.

In response to the Motions for Summary Judgment filed by the Respondents, Petitioners put in the record in the courts below scores of examples of statements, and/or actions by the Respondents that would support the necessary elements of the Complaint sufficient to permit a reasonable trier of fact to find for the Petitioners. While no one point made by the Petitioners may have been sufficient to establish a *prima facie* basis for any one claim *in toto*, taken together the examples supplied by the Petitioners gave more than adequate support for the positions they took.[6]

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[5] The Court even stated that "[w]e do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." *Celotex Supra* at 324.

[6] Petitioners do not in this Petition have space to review in detail all of their claims of error in the reasoning of the court below and its application of the law. Rather than mention perfunctorily all of their claims, the Petitioners have choosen

I. THE CLAIM OF CONSPIRACY

The Sixth Circuit said that "[n]othing in the record of the case at bar supports a claim that the police conspired in any way to deprive the plaintiffs of their constitutional rights." App. A-16. While the Sixth Circuit did not specifically make a similar statement concerning the Board Respondents, it affirmed the decision of the District Court that stated that there was "no evidence to support such a claim." App. A-47. Petitioners strongly disagree.

Petitioners claimed below that the Westerville Board of Education (acting primarily by and through Board President Don Miller and Superintendent Ernest Husarik) and the Westerville Police Department (acting primarily by and through Officer Richard Tiburzio) conspired to deprive the Petitioners of rights guaranteed under the First and Fourth Amendments to the United States Constitution. The basic scenario[7] argued by the Petitioners follows.

A. The Third Try

In May and June of 1988 the Board of Education had placed on the ballot an operating levy. An operating levy is a tax on real property that must be approved by the voters. Like most taxes related to the building or maintaining of accepted societal institutions (i.e. Education, Transportation, etc.) many good people vehemently favored its passage - many good people opposed it. First in May, and again in June the voters said "No" to the Board proposal.

In spite of this disapproval, the Board immediately placed on the November ballot the same levy, for the third time.

B. Pro-Levy

The Board of Education represented the strongest "pro-levy" organization in existence in the Westerville community.[8] They had

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to deal in detail with three. They are the claim of conspiracy, the claim of the use of content specific rules that discriminated against the Petitioners, and the claim of lack of probable cause. Quite frankly, if this Court determines that Petitioners' reasoning fails on all of those claims, the others fall by the wayside as well.

[7] Petitioners will support in the footnotes the vast majority of representations and inferences that are made in their story of what happened. Petitioners believe that the portrayal is reasonable given what is known.

[8] The Westerville School Board desperately wanted to win passage of this tax increase.

both power and authority that no other "pro-levy" group possessed due to their elected positions and the funds and physical facilities at their disposal.

C. Anti-Levy

The Petitioners and a few others represented the only vocal "anti-levy" group in the community. They had limited funds, but they were willing to speak for the thousands of citizens that voted against the levy yet were reluctant to express their views publicly.

The recognized leaders of the "anti-levy" forces were Carl H. "Pete" Huffman, Gordon V. Rood, and Maureen Hansen, Petitioners herein. Jt Apx at 553. In May and August of 1988, the Petitioners (either independently or collectively) were instrumental in rallying the "anti-levy" forces and defeating the previous levies.

The Board obviously did not philosophically agree with the position of the anti-levy group.[9] However, this difference of opinion went beyond issues as the Board began to paint the anti-levy effort in a negative light.

D. The Board's Bias

In the battle for votes during the campaigns, the Board unfairly used all of its considerable power and influence to give preference to "pro-levy" forces.[10]

The Superintendent and other school employees helped to set up a support committee of people who where not school employees in order to lobby in favor of the levy. Jt Apx at 1419-20. It was not unusual for Defendants Husarik, Hayfield, or other School Board officials to recruit people to the pro-tax levy group, go to organizational meetings, give technical assistance and answer questions. *Id.*, at 1420.

The pro-levy committee, eventually known as the Blue Ribbon Committee, arranged support from the School Board directly through Defendant Husarik personally. Jt Apx at 1428. Husarik himself attended "as many coffees (campaign meetings) as I could get into." Jt Apx at 1429.

[9] The Board and its highest officials, Superintendent Husarik and Assistant Superintendent Hayfield, did not like the Petitioners or their actions.

Respondent Hayfield felt that the tax opponents were "failing to support the school system," and "not supporting good education for the kids." Jt Apx at 1341-42. Respondent Hayfield resented the things CATW leaders did at School Board meetings, as did Superintendent Husarik. Jt Apx at 1380.

[10] The pro-levy Blue Ribbon Committee was permitted to hold their campaign meetings in the School Board offices, in the conference room. Jt Apx at 1430. The Board permitted them to use their facilities at no charge. The Board has not permitted any other political group to use its facilities for free. Jt Apx at 1430-31.

At no time was this unfair use of power and position more blatant and discriminatory against the "anti-levy" camp than it was in the period surrounding the October 24, 1988, public school board meeting. During this time frame, the Board's actions went far beyond conduct that was appropriate for persons who hold positions of public trust and are charged with administering their offices in a manner that will not unduly prejudice the rights of any individual or group over whom they exercise power and authority. There is substantial credible evidence that the Board conspired to give unfair advantage to the political position it supported and to publicly discredit and humiliate those citizens who opposed their view.

E. The Plan To Discredit The Opposition.

Evidence suggests that Board President Miller and Superintendent Husarik recognized that it was in the best interests of the pro-levy group to discredit the anti-levy leaders and their cause. In order to do that, the CATW leaders would have to be shown to be doing something "wrong" or at least something that the average voter, watching the proceedings on television, would believe was wrong. This took calculated thought and planning.

The Board members themselves also worked on behalf of the levy by going to coffees, etc. (Jt Apx at 1297-98) This was organized by Board employees, at public expense. Jean Orr, Mr. Husarik's Administrative Assistant, coordinated which Board member would go where. Jt Apx at 1298.

The "speaking engagement sheets" for the political campaign were delivered from Mrs. Orr to the Board members by school employees. Jt Apx at 1300. Mrs. Orr made the telephone arrangement during her work hours. Jt Apx at 1301.

Respondent Hayfield also spent time working on the levy campaign. Jt Apx at 1339. There were no limits on his authority to talk to the public about the levy. Jt Apx at 979. Hayfield provided assistance to the Blue Ribbon Committee promptly. He spoke on behalf of the Speakers Bureau. Jt Apx at 1340 and 1351.

The School District produced, at public expense, "school fliers," which urged people to vote for the tax raise. The school letters were then distributed to the students in the schools, and at public meetings. Jt Apx at 1340-45.

The School Board periodically published, at taxpayers expense, a pro-levy newsletter called the "School Community Update." This came directly from Superintendent Husarik's office. Jt Apx at 1434. A copy was attached at 1069-72. This pro-tax literature was mailed directly to every resident in the school district -- at public expense. Jt Apx at 1434-35. The Board Respondents invested huge resources to help the supporters of the tax levy.

Pete Huffman and Gordon Rood had lived in Westerville for many decades (Jt Apx at 972-73.), and while they may have been outspoken and opposed to the school levy, they, along with Maureen Hansen, were respected members of the community. They did, however, have one common trait that the Board determined to exploit -- all three CATW leaders valued highly their right to express their views. Husarik and Miller planned carefully to use this against them -- to set them up.

1. Step One - Hire A Policeman

Husarik and Miller first determined to hire a policeman to be present at the October Board meetings. This was a part of their plan to squelch the opposition and was carried out by a subordinate in Dr. Husarik's office.[11]

Ostensibly, the policeman was to be at meetings to help keep order, but one of the requirements that accompanied the request for the officer belied their stated intent. The policeman, Officer Tiburzio, was asked to be in plainclothes.[12]

2. Step Two - Explain To The Policeman His "Job."

Husarik and Tiburzio met together before the October 24 meeting and discussed Tiburzio's "job." The court below inferred nothing from the fact that Husarik denied that any such meeting ever took place,[13] yet accepted without question, one of Officer Tiburzio's statements in deposition that he was told by Husarik to keep the pro-levy and the anti-levy people apart "and that was it." This statement by Tiburzio is simply untrue.[14]

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[11] Don Miller as Board President had authorized the hiring of a special duty, plainclothes police officer. Jt Apx at 536. The Board did not discuss the need for an officer. Jt Apx at 539-40. Superintendent Husarik or a designee obtained the officer. *Id.*, and at 1423. There weren't normally police at Board meetings "until this period of 1988" (Jt Apx at 1422-23) and shortly after the levy campaigns were over, the Board discontinued this practice. *Id.*, at 1422.

[12] Reason would suggest that order is more easily maintained in public situations by the visible presence of uniformed officers.

[13] Respondent Husarik denied both at the criminal trial of Petitioners Huffman and Rood and in deposition that he had any conversation with Tiburzio at all other then "saying hello." Jt Apx 1423 and 641.

[14] Officer Tiburzio stated in deposition that the first night he arrived at the school board meeting to be the special duty officer [which was October 10, 1988] he sought out Dr. Husarik to find out what his duties were. Dr. Husarik purportedly told him that his duties were "...to make sure that there were no problems

Tiburzio was told by Husarik that "he" would let Tiburzio know when he was to intervene in the meeting. (See Tiburzio's second and third statements in previous Footnote). During this conversation, Husarik made it clear to Tiburzio that when Petitioner Huffman got up to speak and was ruled out of order, that he (Husarik) "wanted Mr. Huffman [taken] out of the meeting."[15]

Husarik also expressed to Officer Tiburzio that when Mr. Rood tried to speak, Husarik wanted "Mr. Rood to be removed from the meeting."[16]

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between the proponents, or the people that were for a school levy, and those against a school levy. **And that was it.**" Jt Apx at 1516-17. (Emphasis added.)

However, a few minutes later in the deposition he stated, "I believed that if there were any problems, they would let me know, and nothing was ever said as to how or what. **They would just say if there's -- if I was needed, they would let me know.** Jt Apx at 1520. (Emphasis added.)

Tiburzio's augmenting of his earlier statement about the limits of his conversation with Dr. Husarik by adding that "if I was needed, they would let he know" is an admission that there was more to his earlier conversation than he initially indicated. Tiburzio was willing to alter the facts at his deposition to reflect a scenario that was consistent with that of the Respondent School Board.

Still later in Tiburzio's deposition, he again contradicted his first statement.

> Q. Husarik never told you, "If I signal you, I want you to take the person at the podium out of the room?"
> A. What I had told you earlier was that he would let me know if I was needed. **They would tell me to come in if they needed me to intervene.** Jt Apx at 1522. (Emphasis added.)

Of course Officer Tiburzio had not told Petitioners' counsel earlier that "he would let me know if I was needed." Nor had Officer Tiburzio said "they would tell me to come in if they needed me to intervene." This third statement changes in very significant ways both of his previous admissions. First, Tiburzio now admits that "he would let me know if I was needed." This testimony was intentionally omitted in the first statement.

This admission is also important because it demonstrates that when Tiburzio referred to "they" in both the second and third statement quoted. The "they" logically refers to Dr. Husarik and Board President Miller.

[15] See Tiburzio's written report ("Witness Statement") of what happened on October 24, 1988 at App. A-57. In that he states specifically that "Dr. Husarik wanted Mr. Huffman out of the meeting."

[16] See "Witness Statement" App. A-58 where Tiburzio states "Dr. Husarik wanted Mr. Rood to be removed from the meeting." Superintendent Husarik's own written Witness Statement concerning the events at the October 24 meeting includes the

Board President Don Miller knew about the meeting between Husarik and Tiburzio and Miller knew that Tiburzio was instructed what to do when the "anti-levy" leaders attempted to speak.[17]

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following comment: "Mr. Tiburzio was requested to **remove** Mr. Rood." Jt Apx at 1085. (Emphasis added.)

During the jury trial of Petitioners Pete Huffman and Gordon Rood, Husarik was asked if he could tell what that statement referred to. He responded "No, I – I really cannot." Jt Apx at 662. Superintendent Husarik was then asked if he had told Officer Tiburzio to remove Petitioner Rood. He responded simply "No."

Both Husarik and Tiburzio used an identical term (i.e. "remove") in referring to what Tiburzio was asked to do with Petitioner Rood at the October 24 meeting, yet they both deny that Husarik told Tiburzio to "remove" him. Of course, Officer Tiburzio laid the statement at the feet of Superintendent Husarik. Dr. Husarik couldn't say what it meant.

[17] At the criminal trial of Huffman and Rood, Don Miller had a very telling exchange with defense counsel.

> Q. Actually, on the tape, you can see that Mr. Husarik does a very small hand motion, kind of like this, and nods his head off to this side, and then the police officer shows up in the picture; right?
>
> A. Correct.
>
> Q. ...Do you know if that was a signal it's time to come in and get these guys?
>
> A. I have no idea if that was a signal or not.
>
> Q. Well, Mr. Husarik never said a word to the policeman, did he?
>
> A. No.
>
> Q. Not during the entire meeting?
>
> A. Not during **that part** of the meeting.
>
> Q. So do you have any idea how the policeman would know what these signals meant unless it was discussed ahead of time?
>
> A. I have no idea.
>
> Q. Thank you. Have you asked Mr. Husarik about that?
>
> A. Not about a **specific** signal. **I do know that he, in some way, indicated to the officer that -- if the meeting was -- needed some control.**
>
> Q. And your understanding of the signal was that the officer was then supposed to come in and take the person out of the room....
>
> A. **It was not my understanding he was supposed to take him out necessarily. It was just to ask the individuals or ask whoever was out of control to either sit down or leave, one or the other, whichever would occur.** Jt Apx at 594-95. (Emphasis added.)

Three logical inferences can be drawn from the latter two responses of Respondent Miller. One, either Miller and Husarik had had a conversation about what Husarik told Officer Tiburzio or Miller was present during the discussion.

As Board President, Don Miller's decision at Board meetings concerning who would and would not be allowed to speak was the "rule" (i.e. the law) even when it conflicted with his Board's own written policy. He simply did what he wanted to do.[18]

3. Step Three - Set The Trap.

After the October 10 meeting, Board President Miller telephoned Gordon Rood at his home on at least three separate occasions to discuss the levy. Jt Apx at 987. On the evening of October 17 he finally reached him. Jt Apx at 546.

During the conversation Gordon Rood inquired of Don Miller, someone he had known since childhood, how he was going to handle the October 24 meeting as there would be many people who wanted to speak. Jt Apx at 546. Don Miller told Gordon that there had been "no problem" at the last meeting[19] and that there would be "no problem" at the October 24 meeting. Everyone would be permitted to speak. Jt Apx at 987.[20] Gordon Rood was so convinced that Don Miller would keep his word, he not only relayed the conversation to those CATW members who were present in his home that night, he told all of the others he spoke to prior to the meeting as well. *Id.* Miller had successfully set the trap.

4. Step Four - Bait The Trap

At the October 24 meeting, Board President Miller waited until everybody had sat through over a half hour of "business," including

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Two, Miller knew that part of what Husarik had talked to Tiburzio about was what the officer should do if anyone was "out of control." Three, Miller and Husarik expected that someone would be "out of control."

[18] Don Miller "had total discretion" over the meeting (Jt Apx at 558) and who he would or would not allow to speak. During the criminal trial there is the following exchange:

> Q. You, as the Board, also had complete and total power to pick whether you let everybody speak or just some and which people you would allow to speak and which people you would not allow to speak."
>
> A. Yes. *Id.*, at 558, lines 18-22.

[19] On October 10 everyone that wanted to speak was permitted to do so even though Miller had to extend the time allotted for Communication. Jt Apx at 917. Apparently one individual, Agnes O'Keefe, was permitted to speak even though she had not filled out a sign-up sheet.

[20] Respondent Miller does not deny that he gave this assurance to Gordon Rood. Jt Apx at 547.

3 pro-levy orations outside of the communications section, (See JEx 2 at 0:31:00.)[21] before announcing the rules for the evening.

Miller prefaced this announcement with the observation that many more people had signed up to speak (23 speaker slips were purportedly completed [Jt Apx at 510]) than they "would typically have time for if everyone spoke for five minutes." JEx 2 at 0:31:04-14.[22] He did not say that night how much time he would allow for the communications section of the agenda or how long he would permit everyone to speak. The only rule he outlined was a "new speakers" rule that had not been used at any previous meeting. He said that in calling on speakers he would "lean towards those who

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[21] These speeches were pre-arranged and pre-planned by Miller to take place outside of the Communications section. Don Miller wrote out two pages of notes before the October 24th meeting. Jt Apx at 1078-79. On the second page of the hand written notes [which is reproduced in the Appendix at A-59], in the lower left hand corner is a list of persons under the heading "Possible Speakers."

This list includes 12 pro-levy speakers and 3 anti-levy speakers. The 3 anti-levy speakers are at the bottom. They are CATW leaders "Gordon" [Rood], "Pete" [Huffman], and "Maureen" [Hansen].

There is a star or asterisk beside two of the names of pro-levy speakers. They are "City Council - Parimuha" and "Finance Committee - Sue Robertson." The last name [Robertson] is followed by the words "outside of 45 minutes before communication." This indicated that these two pro-levy addresses would be given outside of the 45 minute time limit for "public" communication. They were.

First the representative(s) from City Council addressed the audience and then Susan Robinson (Robertson). Actually two persons spoke from City Council rather than one. Councilman Parimuha was not available, but Mayor Mary Lou Proutty (Joint Exh. 2 at 0:06:35 to 0:09:00) and Councilman Steve Wenger (Joint Exh. 2 at 0:09:00 to 0:13:05) filled in for him and both gave pro-levy orations. About ten minutes later Susan Robinson addressed the Board and audience. See Joint Exh. 2 at 0:24:24 to 0:27:00. These three spoke outside of the "Communications" portion of the Agenda.

To the right of the "Possible Speakers" list is a box about three inches on a side. Inside the box are written the numbers 1 through 11. After numbers 1, 2, 3, 4, 5, 6, 8, and 11 are the last names of persons whom Miller expected to have speak at the October 24th meeting. They are in order "Cepek," "Naughton," "Huffman," "Sandman," "Brant," "Rood," "Robbins," and "MacDermott." These notes were made before the meeting. There is not a direct correlation between the notes and who actually spoke at the meeting. Jt Apx at 1079 and 918.

[22] Miller said, "I encourage you to make your comments succinct and I'll tend to be -- I'll try to be as fair as I can be. I don't recognize many of the names. I will lean toward those who have not been speaking (sic) before. Just because there's been -- there's many of the people who I do not recognize." JEx 2 at 0:31:18-32.

have not been speaking (sic) before." JEx 2 at 0:31:18-32. His only stated "reason" for this "new speakers" rule was that he did not "recognize many of the names" and "...-- there's many of the people who I do not recognize." This statement was patently false and designed to hide the real reason why Miller did not call on either Huffman or Hansen. He did not want them to talk.

After the communications section was over and Miller attempted to justify what he had done, he stated relative to both individuals who had spoken and those who had not spoken that night, "I don't know everybody, but I know most everybody." JEx 2 at 1:35:11-13. This statement contradicts Miller's original statement. Miller's comment about "not recognizing many of the names" was a subterfuge.[23]

If Miller knew "most everybody," but "a couple," as he stated on October 24, then what was the reason for the "new speakers" rule?

This "new speakers" rule was aimed directly at the CATW leaders Huffman, Rood and Hansen. It was meant to keep them from speaking. (See "Content-Specific v. Content-Neutral" discussion below.) After all of the assurances by the Board and Dr. Miller before the meeting that Petitioners would be allowed to speak, the rules for them had been changed to exclude them.

The Petitioners had come to express their views. Now, they would either have to sit quietly and comply with this "new speakers" rule or disobey Don Miller's unfair pronouncements and attempt to speak. The bait had been set in the trap. The CATW leaders waited.

5. Step Five - Spring The Trap

After 47 minutes, Miller announced that "[w]e're running out of time, so I'm going to say we'll have two more speakers" -- Del

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[23] There is another comment from Miller's trial testimony that further clarifies the fact that Miller **did** know everybody. While explaining how "fair" he was trying to be with the speakers at the October 24 meeting, Miller made the following observation:

> "Since it was a heated issue with the levy, I felt, even though we were going to call on those who had spoken the least recently, I was going to make it balance, so we would try to have as many -- as many speak for the levy -- so we have as many speak for the levy as against the levy.
>
> And, of course, by that time **I knew many** of the people, so **I could expect who was going to speak for and against**, although, I'll tell you, **a couple I did not know** and did not know how they were going to speak. Jt Apx at 531. (Emphasis added.)

Waggoner and Jack Sandman. JEx 2 at 1:17:58.[24] Actually at that point in the meeting there really was not "time" for any more speakers according to Don Miller's previously stated 45 minute rule. That did not matter to Don Miller. As Miller's notes (App. A-59) indicate, he wanted a pro-levy speaker to speak last and he wanted Jack Sandman to speak. Miller was making sure that he got what he wanted, without regard to the rights of others.

After Del Waggoner spoke, the Board took 3 and 1/2 minutes to respond to one of Del Waggoner's comments. JEx 2 at 1:22:40 to 1:26:00.[25] After they finished their discussion, Petitioner Huffman rose from his chair behind the podium and, asked pursuant to a point of personal privilege under "Robert's Rules of Order," to be given two minutes to address the Board. JEx 2 at 1:26:01.[26] This was what Miller and Husarik had planned for. The trap had been sprung.

6. Step Six - Discredit The Opposition Leaders

In rapid succession, Pete Huffman was ruled out of order; Husarik[27], true to his word that he would let him know when to intervene, signaled[28] for Officer Tiburzio to come in (JEx 2 at

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[24] Don Miller knew Jack Sandman. He knew that he was President of the Chamber of Commerce and not a resident of the district. Jt Apx at 629.

[25] For a Board that was truly concerned about how much time they were taking, this seemed strange. When they finally decided to proceed with the last speaker, 55 minutes had elapsed.

[26] Pete Huffman sought to use the rules he believed were in place for the meeting -- Roberts Rules of Order. The Board had adopted those rules as their own on 3/10/70 for "all of its meetings." Jt Apx at 1080. However, the Board argued that the rules were just for the Board and not for the citizens, (Jt Apx at 1317) even though they admitted that they had never communicated this "fact" to anyone. *Id.*

[27] Note: In Joint Exhibit 2, the videotape of the October 24 meeting, Dr. Husarik is the gentleman seated at the dais on the far left-hand side of the screen.

[28] There are two "signaling" motions -- a nod and . small hand-signal. Both are small, unremarkable gestures. Persons seated in the audience could not have seen the hand gesture as there is a small eight inch high wall on the front of the dais where Husarik was seated and the motion was made very close to the top of the desk surface. The gestures would have gone unnoticed, but for two serendipitous events. One, the meeting was being televised and one of three cameras captured Husarik's movements. Two, the camera that had that vantage was the one that was broadcasting at the time the motions were made. Only two seconds before another camera was broadcasting which was focused only on Petitioner Huffman.

Neither motion is bombastic. The hand motion was made by with primarily the index finger of the left hand. Certainly, with all that was happening at that

1:26:26-30);[29] Pete Huffman was arrested and escorted out. JEx 2 at 1:26:37 to 1:27:05.

Gordon Rood stepped to the podium to protest the Board's conduct. Miller ruled him out of order. Tiburzio returned (JEx 2 at 1:27:34), arrested Rood and "removed" him from the meeting.

Maureen Hansen waited until the last recognized speaker had completed his remarks and then asked to speak. JEx 2 at 1:39:00. She told Miller that his practice of looking at the speaker slips and then picking and choosing who would speak was not fair. JEx 2 at 1:39:38-42[30] (This practice is a content-specific choosing of speakers and clearly unconstitutional.) Husarik got up out of his chair, left the meeting room, summoned Tiburzio back in and then returned to his place at the dais some thirty seconds later. JEx 2 beginning at 1:39:35.[31] As Tiburzio entered, Miller pleaded with Mrs. Hansen to sit down because he did not want to have her arrested, which appeared imminent. "Please Mrs. Hansen!" he said. "I don't want to do this. Please sit down." JEx 2 at 1:40:33-37. Miller did not know that Tiburzio had already been told (by Husarik) just to escort Mrs. Hansen out of the room.[32] However, once she was out in the foyer, she and other CATW members were threatened with arrest by Tiburzio if they did not leave the building.

In the aftermath of the October 24 meeting, Husarik and Tiburzio exchanged pleasantries in the foyer. Husarik was laughing and said to Tiburzio, "We sure fixed Gordon Rood." They looked at each other and smiled. Jt Apx at 696.[33]

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particular moment in the meeting, Officer Tiburzio would have had to have been watching Superintendent Husarik intently or he would have missed this signal.

[29] Tiburzio arrived six seconds [JEx 2 at 1:26:36] after Husarik's signal.

[30] Petitioner Hansen said, "Try to figure out who's going to say what and then pick them? That's not fair."

[31] Don Miller did not know that Huffman and Rood were going to be taken out or arrested. His understanding was that Tiburzio would "ask whoever was out of control to either sit down or leave." See Footnote 17 for his trial testimony.

[32] Tiburzio stated in deposition that the person who came out told him "We need to have them escorted out." Jt Apx at 1534.

[33] A tax opponent named Lewis Hinkle was standing to the side of the foyer. He had put his coat on which covered his CATW button. Jt Apx at 696. As Superintendent Husarik and Officer Tiburzio walked through the lobby together that evening, Lewis Hinkle heard Husarik say to Officer Tiburzio, "We sure fixed Gordon Rood." *Id.* They smiled. Jt Apx at 697.

Tiburzio and Husarik had reason to smile. Looking at the "scoreboard" for the evening it was clear that the pro-levy forces had "vanquished" the opposition. Of the first seven pro-levy speakers that Board President Miller had listed in his pre-meeting notes as "Possible Speakers" - six had spoken. App. A-59. Of the only three anti-levy speakers that Miller had listed as "Possible Speakers" in those same notes - all three had been ruled "out of order" and "removed" from the meeting. App. A-59. Two had been arrested. It appeared that it had been a good evening for the Board.

The above perspective of the October 24 meeting, is based entirely on facts from the record below from which a reasonable jury could conclude that the foregoing story is essentially accurate. If this Court believes that the inferences made are possible, then the ruling of the Sixth Circuit sets an improper standard for summary judgment, inconsistent with this Court's prior rulings, which must be reversed.

II. Content-Specific v. Content-Neutral

The appellate court below ruled that "the Board's policy of limiting the number of speakers, limiting the duration of their comments, and giving preference to new speakers...was a permissible content-neutral restriction on the time, manner, and place of the plaintiffs' speech and did not violate the plaintiffs' First Amendment rights." App. A-19.

Petitioners respectfully disagree. This ruling fails to adequately consider the evidence put in the record by the Petitioners about these so-called "rules."

First, it was Board President Don Miller's stated intent to choose people absolutely based on the content of their speech. He made this clear at the October 24 meeting (See JEx 2 beginning at 1:35:00) and reiterated it in his trial testimony when he admitted on direct examination "I was just going to go through the list, keeping a balance from pro and con, until we got to about 45 minutes." Jt Apx at 577. This was content-specific selection. Further, Miller conceded that he organized the list in a certain order, the order in which he wished to call speakers. *Id.*, at lines 18-19.

Second, what is not apparent even from this latter admission, is that Miller had preplanned who would speak before the meeting took

place. Of the first seven pro-levy speakers listed in Miller's notes under "Possible Speakers," (See Footnote 21 above) six spoke at the meeting. Cepek and Naughton were the first two speakers Miller had pre-determined to have speak in the box with 11 numbers (See App. A-59) only he put Jill Naughton before David Cepek.

This was a case of total orchestration of the communication portion of the meeting. Miller pre-determined not only who would speak, but their order as well. His overriding consideration was content - pro-levy content. This was not a "content-neutral" process.

Third, as discussed above (beginning at page 17), Miller's "new speakers" rule had a specific purpose. At first blush, this rule may have the aura of being "content-neutral," but it must be interpreted in light of all the surrounding facts and not in a vacuum. The "new speakers" rule affected no one else but the Petitioners. It discriminated most significantly against the three CATW leaders that were not permitted to speak and were "removed" from the meeting - Huffman, Rood and Hansen.[34] Miller not only eliminated the leaders of the anti-levy camp with this rule, he set them up to be ruled out of order with his latest new rule. He was "leaning" on them.[35]

Fourth, obviously the Board had a right to put time limits on public participation, both as to its total length (45 minutes) and the time any one speaker could take (5 minutes).[36] But the Board did not

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[34] They were the only three people who had spoken at the three previous meetings. The Board had been keeping track of who had been speaking at previous meetings. Jt Apx at 916-17. Miller was aware that these three Petitioners had each spoken at both of the two previous Board meetings. *Id.*, and JEx 2 at 1:35:25-30. The "new speakers" rule had no impact at all on the pro-levy speakers as none of those chosen for the meeting had spoken during either of the last two meetings.

[35] Lest anyone suspect that Miller took any chance of either one of the two CATW leaders who had executed speaker slips that night accidentally being called on to speak, it should be pointed out that Miller made sure that wouldn't happen. Miller stated on direct examination at Huffman and Rood's trial as follows:

> **And I had known the people, obviously the ones that spoken (sic) repeatedly over the last several meetings, so we kind of put them on the bottom.** Jt Apx at 532. (Emphasis added.)

[36] The Board could have decreed that only two minutes would be permitted per speaker that night and then allowed all 23 persons to speak in only 46 minutes.

limit the public participation to 45 minutes. They did not stick to their own rules - new or otherwise.[37]

Fifth, Miller went beyond his stated 45 minute limit to allow Jack Sandman, whom he knew to be a strong pro-levy speaker, to speak. Jt Apx at 629 and JEx 2 at 1:18:00. Originally Miller had wanted Mac McDermott to speak last (see App. A-59), but McDermott had apparently not shown up and filled out a speaker's slip. Miller ignored the residency requirement and substituted non-resident Jack Sandman (Jt Apx at 629), as the last speaker. Miller ignored the rules, "new" and "old," when it promoted what he wanted promoted.

Petitioners maintain that the "new speakers" rule was not "content-neutral," and that the application of this and other "rules" by Respondent Miller had the effect of restricting and/or totally abridging the rights of the Petitioners.

III. The Question of Probable Cause

The Sixth Circuit stated that "[o]ur review of the videotape of the meeting persuades us that the existence of probable cause to arrest and prosecute both men [Petitioners Pete Huffman and Gordon Rood] for disturbing a meeting is beyond dispute." App. A-11. The judges below failed to take into account the circumstances beyond what they "saw" on the videotape.

The Sixth Circuit referred to *McFinley v. Bethesda Oak Hosp.*, 79 Ohio App.3d 613, 616-17, 607 N.E.2d 936, 939 (Hamilton Co. 1992) in citing the proposition that "[i]n determining whether an officer had probable cause to make an arrest and file criminal charges, his conduct is to be analyzed in light of the facts or circumstances know to him at the time." App. A-10.

Petitioners set out above a statement made by Officer Tiburzio in deposition in which he said that the Board would "tell" him to come in to the meeting room if they needed him to intervene." (See

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[37] This was not a new tactic. Judge Sheward had recognized this propensity of Miller's when he rendered his opinion acquitting Petitioner Rood of disorderly conduct during the September 12th meeting. Judge Sheward said "I think what is significant is that Mr. Miller did not stick to the plan, his plan; that is, five-minute speakers for forty-five minutes." Pages 18 and 19 of decision. Jt Apx at 889-90.

Footnote 14 above.) Superintendent Husarik did, in fact, invite him "to come in to the meeting room."

In Officer Tiburzio's written report of the events of the October 24 meeting, he makes it clear that he was under the direction of the Board in the person of Superintendent Husarik when he entered the council chambers to Approach Petitioners Huffman and Rood.

Officer Tiburzio stated with regards to Petitioner Pete Huffman, "I did not enter the room until I was motioned to do so by School Superintendent Dr. Husarik." App. A-57. Officer Tiburzio stated in the same report with regards to Petitioner Gordon Rood, "I again was asked to approach the podium by School Superintendent Dr. Husarik." App. A-58.

Another comment that suggests that Officer Tiburzio was willing to be directed totally by the Board is the following deposition testimony regarding Petitioner Maureen Hansen:

> Q. Okay. Tell me what happened with Miss Hansen then.
> A. Well, I was out in the lobby, and I do recall someone come (sic) out and told me that they were having problems, again, that somebody else had approached the podium. And they pointed into the room -- I looked in -- told me, "We need to have them escorted out." And I don't know who it was. I just don't. Jt Apx at 1534

As outlined above at page 20, the videotape (JEx 2 at 1:39:00 to 1:40:35) clearly suggests who this person was. It was Dr. Husarik. He summoned Tiburzio into the room to evict the last of the three pro-levy leaders listed in Miller's notes.

Petitioners quote one last statement made by Officer Tiburzio at his deposition that bears on his intent not to act independently on that October evening. The comment is descriptive of Officer Tiburzio's state of mind while watching Petitioner Pete Huffman at the podium. Officer Tiburzio stated, "I think I waited and waited, and seeing that Mr. Huffman was pretty loud -- I didn't, like I said once before -- didn't want to go in." Jt Apx at 1536.

The two statements from his report and the latter comments from his deposition, indicate that Officer Tiburzio did not act based on his own beliefs and/or observations, but that he waited patiently for a signal from the Board before he made a move. There was no

autonomous determination. Certainly, a police officer cannot be said to be doing his duty as an independent officer if he waits for, or is guided in the selection of his target by one who has no authority whatsoever to make a determination as to who is and who is not breaking the law. Petitioners maintain that Officer Tiburzio's actions were controlled and orchestrated by the Westerville Board of Education through the persons of Board President Don Miller and/or Superintendent Husarik, and at no time did Officer Tiburzio object to this direction or take the initiative on his own to approach and/or arrest anyone.

The question here is not only whether "probable cause" existed, but whether any of the elements of probable cause were even evaluated or considered. The fact that the Board wanted Tiburzio to come in, to enter, to intervene, to take out Petitioner Huffman or to remove Petitioner Rood, does not amount to probable cause.

IV. This Court's Rulings Were Quoted But Not Followed

In enunciating the basis upon which they would rely in judging the merits of the Petitioners' claim, the Sixth Circuit quoted from *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) as follows: "Summary judgment is appropriate against a party who, having been called upon to do so, fails to come forward with evidence tending to establish a disputed element of that party's case." See *Celotex* at p. 322. Petitioners did "come forward" by identifying numerous facts and statements which supported their claims.

The Sixth Circuit panel further amplified the basis upon which they were ruling by adding the following: "This court reviews summary judgment proceedings *de novo*, making all reasonable inferences in favor of the nonmoving party. *EEOC v. Univ. of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990)." Petitioners have no quarrel with this criteria as it appears to be a reasonable statement of the current rule.

Petitioners' disagreement with the Sixth Circuit is that they repeatedly failed to apply the law cited, including the latter caveat from *EEOC, supra* and other pronouncements that have expanded and refined summary judgment proceeding guidelines in evaluating the evidence and/or information set out for their perusal by the Petitioners. Specifically, while quoting from *Adickes v. S. H. Kress*

& Co., 398 U.S. 144 (1970), they failed to follow the guidelines laid down there and reiterated by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Petitioners believe that many significant elements of the case at bar are very similar to those in *Adickes, supra.* In *Adickes* the plaintiff maintained that agents of Kress arranged with the police to have her arrested for vagrancy when she left the defendant's premises after she was refused service.

In the case at bar, Petitioners claim that they were set up. In spite of the Board's open invitation to all to speak, and Board President Don Miller's specific assurance that they would be allowed to speak, Petitioners maintain that Respondents never intended to let them speak and that the Board and police planned to remove and/or arrest them if they disobeyed any of the rules -- especially the "new speakers" rule decreed that evening by Board President Don Miller after they arrived and took their seats.

This Court in *Adickes, supra* held that the failure of the Defendant to negate evidence of the mere presence of a policeman in the store at the time the plaintiff was refused service was sufficient to establish a basis for going to the jury on the question of the existence of a conspiracy. The Plaintiff did not reach the jury because she had proven the existence of a conspiracy but because "...it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." *Adickes, supra* at 158. There was no evidence that a conversation between the policeman and the Kress employee had occurred - only the possibility.

In this case the Sixth Circuit acknowledged that there was a meeting between at least Officer Tiburzio and Dr. Husarik in spite of Husarik's denial that a meeting took place. But, the Sixth Circuit simply went on to negate that the conversation between Tiburzio and Husarik was anything more than what Tiburzio described initially in deposition. App. A-5. They did not concede that he later changed and/or amended his story, or they determined that the inferences suggested above would not be believed by a jury.[38]

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[38] The lower court indicated that both Tiburzio and Husarik denied that the Husarik's hand signal was prearranged. App. A-5. While Petitioners do believe

In *Adickes* the employee of Kress asserted that he had not communicated or agreed with the police to deny plaintiff service or to have her arrested. In the case at bar we have the same type of denial of a claim of conspiracy between the police on the one hand and the School Board on the other. Respondents denied in the criminal trial of Petitioners Huffman and Rood, and by way of affidavit, that they had any conversation with the policeman (Officer Tiburzio) that directed him to do anything specific to the Petitioners (such as "removing" or arresting them). Jt Apx at 255, 265 and 1423.

The plaintiff in *Adickes, supra* argued that the sequence of events "created a substantial enough possibility of a conspiracy to allow her to proceed to trial..." 398 U.S., at 157.[39]

The Petitioners offer a similar argument but have much more evidence from which a reasonable jury could conclude that a conspiracy existed than the Petitioner did in *Adickes*. Petitioners have the written and spoken words of the Respondents as well as their overt actions captured on videotape. The Petitioners believe that they have demonstrated that there is good reason to infer from their own testimony that at least three principal Respondents - Westerville Board of Education President Don Miller, Westerville Board of Education Superintendent Ernest Husarik, and Westerville Police Officer Richard Tiburzio - made false and/or misleading statements on critical matters including not only the existence of a meeting between and/or among them, but the discussion that took place at that meeting as well.

This Court in *Anderson, supra*, at 248-9 quoted from *First National Bank of Arizona v. Cites Service Co.,* 391 U.S. 253 (1968) as follows:

> "It is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party

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that a signal was prearranged, and that Husarik's hand signal was the signal that asked Tiburzio to intervene, the Petitioners' conspiracy charge does not rise or fall on there being a specific signal. It is enough to demonstrate a conspiracy if it can be shown that a plan existed to give some signal for Officer Tiburzio to intervene and that he would not have done so (intervened) except for the signal. Such a set of facts can rationally be inferred from the words and actions of the Respondents.

[39] The Sixth Circuit has effecnmtively overruled the *Adickes* standard and established a higher one.

> asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." 391 U.S., at 288-9.

Lest there be any misunderstanding about the *Anderson* ruling, this Court stated at 255 in *Anderson* the following:

"Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial by affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Adickes*, 398 U.S., at 158-9.[40]

While the ring of the last sentence of the above quote is very similar to the *EEOC* quote by the Sixth Circuit above, the Sixth Circuit failed to acknowledge the logical inferences from the evidence submitted by the Petitioners that supported their claims, and never even mentioned much of Petitioners' best evidence.

The Sixth Circuit failed to follow this Court's clear admonition in *Anderson, supra*, "...that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Id.*, at 249.

Petitioners have demonstrated above that there are sufficient facts upon which a jury could conclude (infer) that a conspiracy existed to deny them their Constitutional rights under the First and Fourth Amendments to the U.S. Constitution.

V. The Seventh Amendment and the Right to Trial by Jury

Petitioners maintain that when a reviewing court refuses to accept or acknowledge the facts and/or evidence put forward by a

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[40] The majority of this quote was also referred to, and, Petitioners believe supported by, both of the dissenting justices in their opinions. Brennan, J., dissenting in *Anderson, supra* at 265 and now Chief Justice Rehnquist, dissenting *Id.*, at 269.

nonmoving party (in response to a motion for summary judgment as required by *Anderson* and *Celotex*), and refuses to interpret the nonmoving party's evidence in a manner most favorable to that party, not only is there little probability that the nonmoving party will survive a motion for summary judgment, there exists a denial of the nonmoving party's rights under the Seventh Amendment to the U.S. Constitution that preserves the right to trial by jury.

In Justice Brennan's dissent in *Anderson* he voiced his opinion that the ruling of the Court would not be restricted to only cases involving a question of "clear and convincing" proof, but would apply to all cases. One of the concerns of Justice Brennan when he wrote his dissent in *Anderson* was that "...this new rule...will transform what is meant to provide an expedited 'summary' procedure into a full-blown paper trial on the merits....Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial." at 266-7. He concluded his opinion as follows: "In my view, if a plaintiff presents evidence which either directly or by permissible inference...supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made a prima facie case and a defendant's motion for summary judgment must fail regardless of the burden of proof that the plaintiff must meet.... As I read case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain." at 268.

The Sixth Circuit in its fact statement of this case either misstated facts, ignored them entirely, or interpreted them in favor of the Respondents in numerous particulars.[41]

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[41] **I.** In preparing its factual overview of this case, the Sixth Circuit ignored dozens of facts put forth by the Petitioners in its response. It ignored the Board's open bias and favoritism concerning the use of public funds, equipment and facilities.

The Board would not permit the display of red ribbons (a CATW symbol) on school property, although it permitted the display of blue ribbons (a pro-levy symbol).

Petitioners asked the Board Respondents for permission to display their red ribbons in the same public locations where blue ribbons appeared. This request

was immediately denied by the Board, who eventually decided they would **take down their own blue ribbons** rather than give the opponents any opportunity to be heard. Jt Apx at 1302.

The Board allowed the pro-levy organizations to use public buildings, and public distribution facilities.

The court ignored the acts of retaliation against CATW leaders that continued long after the Board supported levy had passed.

While being paid by the Board, Assistant Superintendent Hayfield filed charges against anti-levy activist Margaret McIntyre with the blessings of Husarik in March of 1989 - eleven months after the supposed infraction of Ohio law, over five months after the levy had passed, but prior to the criminal trial of CATW leaders Huffman and Rood where Margaret McIntyre was an important witness.

Don Miller filed charges against Gordon Rood stemming from the September 12th meeting almost five months after the alleged incident with the full support of the entire Board. Jt Apx at 1320. Board Member Collins justified the filing by saying that there needed to be a way for Gordon Rood to understand that his activity **was not going to be tolerated**. *Id.* at 176-77. (Emphasis added.)

Conspicuous by their absence in the opinion below, were any references to affidavits supplied by petitioners which gave a view of this period that was much different from the one quoted by the Sixth Circuit.

The court failed to mention the threat by Tiburzio to arrest Petitioner Rood at the October 10, 1988 Board meeting (Jt Apx at 1137 and 1145-46), and there is no mention of an officer jabbing Gordon Rood in the back with his night stick while Gordon was being taken to jail on October 24. How could this activity be reasonable considering Lieutenant Jones' order?

II. The Sixth Circuit's misstatements of facts are numerous. Petitioners counted over a dozen and a half in the fact overview alone. Five are set out here.

A. The trial court found that Petitioner Rood **had** asked to be recognized at the September 12, 1988 Board meeting, (Jt Apx at 890) the Sixth Circuit said that he did not. App. A-4.

B. It was not Westerville Police Officer Tiburzio that "ejected" Mr. Rood from the September 12, 1988 meeting. App. A-4. Tiburzio was not even at that meeting. See Joint Exh 1.

C. The court below's delineation of the incidents surrounding the September 12th meeting in a basic chronological order (App. A-3.) misses the import of the sequence of events and the purpose for James Fais' letter on January 5, 1989 and for Miller's filing against Rood on January 30, 1989, long after October 24, 1988.

D. The statement that Mr. "...Tiburzio placed his hand on Rood's arm to **guide him from the meeting**" (App. A-6) is the acceptance of a statement clearly favorable to the moving party. Petitioner Rood said that the officer dug his fingers into his arm. Jt Apx at 1134.

E. Petitioner Rood did not "struggle with Officer Tiburzio in the foyer outside the auditorium." App. A-6. It is clear from all the testimony that Tiburzio was not involved in any of the "struggling" in the foyer.

Each error and/or omission may or may not be significant depending on what is in the mind of the person deciphering these and other facts. But, the totality of the errors must weigh heavily on anyone's ability to interpret the facts, and places the Petitioners at a decided disadvantage. What appears to be a lack of thoroughness by the court below may be indicative of the failure of the appellate court to make inferences in favor of the nonmoving party and/or its failure to appropriately apply this Court's guidelines to this case. If the court below missed this many particulars in just those facts that it recited, Petitioners have a legitimate concern as to how many more may have been missed in the bulk of the case (approximately 1,750 pages of briefs and appendix, plus the two videotape exhibits) not paraphrased by the court.

Petitioners maintain that the misstatement, ignoring, and/or misunderstanding of the facts by the court below, coupled with their failure to make logical inferences in favor of the nonmoving party based on the evidence presented by the Petitioners, effectively denies the Petitioners their right to a trial by jury in a civil matter as guaranteed to them by the Seventh Amendment to the United States Constitution.

CONCLUSION

The ruling of the lower court is contrary to this Court's rulings in *Celotex* and *Anderson* and violates Petitioners' rights under the Seventh Amendment to the United States Constitution. Petitioners respectfully request that this Court grant their petition for certiorari or summarily reverse the ruling of the court below to the extent that it failed to grant their request for a trial on all of their claims.

Respectfully submitted,

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APPENDIX

Nos. 93-3231/3303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAUREEN HANSEN, *et al.*,
Plaintiffs-Appellants,
JOSEPH MCINTYRE; LEWIS HINKLE,
Plaintiffs,
v.
WESTERVILLE CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*,
Defendants-Appellees,
CITY OF WESTERVILLE,
Defendant,
ACLU OF OHIO FOUNDATION, INC.,
Amicus Curiae.

ORDER
Rendered January 19, 1995

BEFORE: **NELSON, SUHRHEINRICH, and BATCHELDER**, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY THE ORDER OF THE COURT

Leonard Green, Clerk

Nos. 93-3231/3303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAUREEN HANSEN, *et al.*,

Plaintiffs-Appellants,

v.

WESTERVILLE CITY SCHOOL DISTRICT, BOARD OF EDUCATION, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

FILED NOVEMBER 7, 1994

BEFORE: **NELSON, SUHRHEINRICH** and **BATCHELDER,** Circuit Judges.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
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PER CURIAM. This is a civil case, based in part upon alleged First Amendment violations, in which the plaintiffs appeal from a summary judgment in favor of the defendants. Upon *de novo* review, we conclude that summary judgment was not appropriate with respect to two of the plaintiffs' claims -- one arising from the

alleged exclusion of opponents of a school tax levy from a public meeting of the defendant school board, and the other based on the alleged confiscation of literature opposing the levy. We shall affirm the judgment of the district court as to the plaintiffs' remaining claims.

I

The plaintiffs, residents of Westerville, Ohio, were members of an organization called Citizens Against Tax Waste ("CATW"). This organization opposed a series of tax levies proposed by the Westerville City School District Board of Education.

On April 27, 1988, the board held an informational meeting at a local school. When they arrived at the meeting, defendants Ernest Husarik, superintendent of schools, and J. Michael Hayfield, assistant superintendent, encountered plaintiff Margaret McIntyre. With help from her teenage son and his girlfriend, Mrs. McIntyre was distributing flyers opposing the latest levy proposal. The distribution took place in front of a school building. Dr. Husarik and Mr. Hayfield allegedly "snatched" some flyers from one of the teenagers and informed Mrs. McIntyre that the flyers violated Ohio's election laws.[1] They also told Mrs. McIntyre that it was illegal to distribute her materials on school property and that she must leave the premises. The school officials are said to have threatened to call the police, but did not do so. Mrs. McIntyre continued to distribute the materials, and she left when the board meeting began. A similar incident took place a day later.

At a public meeting of the school board held on September 12, 1988, Dr. Donald Miller, the then president of the board, announced that 45 minutes would be allotted for public participation.

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[1] The flyer was later held to be in violation of Ohio Rev. Code § 3599.09 because it did not include the name and address of the organization or person responsible for it. In 1993 the Ohio Supreme Court ruled that this statute did not violate Mrs. McIntyre's free speech rights. *McIntyre v. Ohio Elections Comm'n*, 67 Ohio St.3d 391, 618 N.E.2d 152 (1993). The United States Supreme Court has since granted certiorari in the case. 114 S.Ct. 1047, 62 U.S.L.W. 3550 (Feb. 22, 1994).

Each speaker, he said, would be given five minutes. (Although the board had not previously limited public comment at its meetings, controversy over the proposed levies had recently led to unusually high attendance; the August meeting had evidently run until after midnight, and as many as 60 people had spoken at that meeting.) Only five members of the public were initially recognized to speak on September 12, but because each of them spoke for more than five minutes, they consumed all the allotted time. At the end of the 45 minutes Dr. Miller announced the conclusion of the public participation period.

Following a recess, Dr. Miller stated that the board would move to the next item on the agenda. At this point Gordon Rood, one of the plaintiffs, insisted that additional spectators be permitted to address the board. (Mr. Rood himself had not asked to be heard during the public participation period.) Dr. Miller ruled Mr. Rood out of order, but Rood continued to pace about the podium and declaim loudly, insisting that "we'll talk until we're heard."

After a temporary adjournment, Dr. Miller announced that the board would allow an additional 15 minutes for public comment at the end of the meeting. Mr. Rood again interrupted and announced that the meeting would not continue until the people who wished to speak were permitted to do so.

At this point Maureen Hansen approached the podium and began to speak without having been recognized. Although ruled out of order, she continued to talk. The board allowed her to complete her remarks. Following Mr. Hansen's comments, Mr. Rood again objected to the board's proceeding to the next agenda item. Westerville City Police Officer Richard Tiburzio, one of the defendants, then ejected Mr. Rood from the meeting for a time.

An additional opportunity for public participation was provided at the conclusion of the meeting, with five more speakers, including Mr. Rood, addressing the board. Of the 11 spectators who were heard that night, at least five were members of CATW.

Several months later, City of Columbus Chief Prosecutor James Fais watched a videotape of the September 12 meeting and concluded that there was a basis for charging Gordon Rood with disturbing a meeting in violation of Ohio Rev. Code § 2917.12. Based on this conclusion, Dr. Miller filed such a charge in a state court. Mr. Rood entered a plea of no contest to a reduced charge of disorderly conduct, but the state court ultimately acquitted him, based primarily on its review of the videotape. Mr. Rood now contends that Dr. Miller's filing of the charge constituted malicious prosecution.

Prior to a public board meeting scheduled for October 24, 1988, the board made arrangements to have Officer Tiburzio present. According to Officer Tiburzio, Dr. Husarik indicated that he wanted to make sure that there was no breach of the peace and that there were no problems between pro-levy and anti-levy people. The plaintiffs allege that Husarik and Tiburzio agreed in advance on a hand signal that would indicate that Tiburzio was to remove somebody from the meeting. Officer Tiburzio denies that they pre-arranged any hand signals, and there is no evidence that they did so.

According to Mr. Rood, Dr. Miller phoned him prior to the October 24 meeting and indicated that "he would allow all persons who wanted to speak the opportunity to address the Board on October 24, 1988." Dr. Miller has neither confirmed nor denied that he gave Mr. Rood this assurance.

The board had instituted a new public participation policy under which the floor would be open for 45 minutes of public comment and those who wished to speak would be required to sign up in advance. The plaintiffs knew of this procedure and understood that compliance was necessary in order to be recognized to speak. Except for Jerry Bresee, all of the plaintiffs attended the October 24 meeting; most of them were wearing CATW buttons.

Because of the large number of people who had signed up to speak, Board President Miller announced at the beginning of the public comment period that there was insufficient time to

accommodate everyone. Preference, he said, would be given to those who had not spoken at a previous board meeting.

After 47 minutes of public comment, during which time 11 people addressed the board, Dr. Miller announced that time would permit only two more speakers. He identified Del Waggoner, a CATW member and husband of one of the plaintiffs, and Jack Sandman, a levy supporter, as the two who would be recognized. Upon the conclusion of Mr. Waggoner's remarks, but before Mr. Sandman had spoken, plaintiff Carl "Pete" Huffman took the podium to ask a question. Mr. Huffman requested two minutes, and although ruled our of order, he refused to yield. Dr. Husarik motioned for Officer Tiburzio, who radioed for backup from the police department. Officer Tiburzio then approached Mr. Huffman, escorted him out, and placed him under arrest for disturbing a lawful meeting. A jury subsequently acquitted Mr. Huffman.

Immediately following Mr. Huffman's departure, Mr. Rood, who had not signed up to speak, took the podium and refused to yield. Officer Tiburzio placed his hand on Rood's arm to guide him from the meeting. Mr. Rood pulled away from Officer Tiburzio and yelled "Get your paws off me" as the two left the room. In the foyer outside the auditorium Mr. Rood struggled with Officer Tiburzio and several other police officers, including Randall Bailey and Ted Smith. Officers Bailey and Smith have both been named as defendants. Mr. Rood was arrested for disturbing a lawful meeting and for resisting arrest. He too was subsequently acquitted by a jury.

Several of the plaintiffs had followed Huffman and Rood to the foyer. After the arrests were made, they returned to the meeting as Jack Sandman was completing his statement. Plaintiff Maureen Hansen then approached the podium and asked that everyone who had signed up to speak be permitted to do so at the end of the meeting. She was ruled out of order, and Officer Tiburzio escorted her from the room. As Ms. Hansen left the auditorium, several of the plaintiffs left the meeting for a second time to observe the activities in the foyer.

The group then reentered the auditorium and plaintiff Lou Waggoner took the podium. She was ruled out of order, and three police officers escorted her to the foyer, followed again by several of the plaintiffs. The plaintiffs allege that Officer Tiburzio asked those who were in the foyer, including several who had not spoken at all during the meeting, to leave the building. He allegedly threatened them with arrest if they reentered the meeting. The plaintiffs thereupon left the building.

The final episode at issue in this action occurred on October 29, 1988, when plaintiffs Carl Huffman and Jerry Bresee carried placards at a busy intersection in Westerville protesting Huffman's treatment at the hands of the police and the school board. They allege that while they were carrying their signs, defendant Police Officer Don Ross and another unidentified officer approached them in a threatening manner and demanded that they identify themselves. They were not arrested.

In July of 1989, 12 plaintiffs filed this action in the United States District Court for the Southern District of Ohio. Named as defendants were the school board and its members; Officers Tiburzio, Smith, Bailey, and Ross; and the City of Westerville. The complaint alleged violations by all defendants of 42 U.S.C. § 1983, based on alleged violations of the plaintiffs' rights under the First, Fourth, and Fourteenth Amendments of the United States Constitution; false arrest and malicious prosecution by the board and Officer Tiburzio with regard to Rood and Huffman; assault and battery by Officers Tiburzio, Smith, and Bailey against Mr. Rood; and assault and battery by Officer Ross against Mr. Huffman and Mr. Bresee.

On February 19, 1993, the district court entered summary judgment in favor of all defendants as to all counts. Eleven of the plaintiffs have appealed the district court's order.[2]

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[2] Plaintiff Lewis Hinkle did not appeal. Plaintiff McIntyre died during the pendency of the appeal, and her husband, Joseph McIntyre, has been substituted for her as an appellant.

II

A

To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the...party is entitled to a judgment as a matter of law." Fed. F. Civ. P. 56(c). Summary judgment is appropriate against a party who, having been called upon to do so, fails to come forward with evidence tending to establish a disputed element of that party's case. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This court reviews summary judgment proceedings *de novo*, making all reasonable inferences in favor of the nonmoving party. *EEOC v. Univ. of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990).

B

We turn first to the claims against the police officers and the City of Westerville. The officers are charged with having committed the state-law torts of assault and battery, false arrest, and malicious prosecution, in addition to having violated the plaintiffs' federal constitutional rights under the First and Fourth Amendments, as made applicable to the states by the Fourteenth Amendment.

1. State Claims

The only claim involving Officer Ross is an alleged assault and battery against plaintiffs Jerry Bresee and Carl Huffman. Bresee and Huffman allege that Officer Ross approached them in a "threatening" manner and demanded to know their names. They say he held his nightstick in his hand, but they do not assert that he touched them, made a motion as if to touch them, or threatened to touch them.

Under Ohio law, tortious assault is a willful threat or attempt to harm which reasonably places another in fear of harmful contact. The threat or attempt must be coupled with a definitive act

by one with the apparent ability to do the harm. *Smith v. John Deere Co.*, 83 Ohio App.3d 398, 406 614 N.E.2d 1148, 1154 (Franklin Co. 1993).

The plaintiffs have identified neither an actual threat reasonably placing them in fear of harm nor an accompanying definitive act. No reasonable trier of fact could find that the holding of a nightstick constituted an assault. In the absence of any evidence that Officer Ross acted maliciously, recklessly, or in bad faith, moreover, he is immune from liability in any event. See Ohio Rev. Code § 2744.03(A)(6). The district court properly granted summary judgment in favor of Officer Ross.

We next consider a claim by Gordon Rood that his treatment at the hands of Officers Tiburzio, Bailey, and Smith after the meeting of October 24 constituted assault and battery. Mr. Rood stated that the officers where "very rough with [him]" and that he was pushed into a wall and forced down to his knees. Witnesses state that they saw the police "jostle," "attack," or "shove" him. He claimed he suffered "great pain" and that he still suffers pain from the attack; the doctor who examined him concluded that he had pulled some muscles.

The police do not deny using force to arrest Mr. Rood, but they maintain that it was necessary to effectuate the arrest. They counted that Mr. Rood was "struggling" and "out of control" and that they had to use force to restrain him. Mr. Rood admits that he pulled away from Officer Tiburzio, that he yelled "get your paw off me," and that he "struggled" with the police, but he insists that he never tried to escape or harm them.

Mr. Rood has not offered any evidence to show that the officers acted maliciously, recklessly, or in bad faith. On the contrary, the evidence suggest that the officers, faced with an admittedly "struggling" arrestee, responded in an entirely proper manner. Although there is a dispute as to how much Mr. Rood struggled and how forceful the police were, the undisputed facts compel the conclusion that the police are immune from liability by

reason of O.R.C. § 2744.03(A)(6). Summary judgment was proper as to this claim.

Plaintiff Raymond Brown was knocked down by the police as they were pursuing Mr. Rood, and plaintiff Margie Bean claims that one of the officer stepped on her foot. Neither Brown nor Bean claims that the police acted intentionally, and there is no evidence of any actionable misconduct in this respect.

Finally, Gordon Rood and Carl Huffman assert claims of false arrest and malicious prosecution against Officer Tiburzio. These claims stem from the events at the October 24 school board meeting, when Tiburzio charge Mr. Rood with resisting arrest and charged both Mr. Rood and Mr. Huffman with disturbing a lawful meeting in violation of Ohio Rev. Code § 2917.12. (Mr. Rood was also charged with -- and later acquitted of -- disturbing the September 12 meeting, but Officer Tiburzio did not arrest Mr. Rood on September 12 and was not involved in any way with the filing of that charge.)

The elements of malicious prosecution are (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused. *Trussell v. General Motors Corp.*, 53 Ohio St. 3d 142, 144, 559 N.E.2d 732, 735 (1990). To maintain an action for false arrest, a plaintiff must show that he was unlawfully detained. *Harvey v. Horn*, 33 Ohio App.3d 24, 27, 514 N.E.2d 452, 454 (Franklin Co. 1986). In determining whether an officer had probable cause to make an arrest and file criminal charges, his conduct is to be analyzed in light of the facts or circumstances know to him at the time. *McFinley v. Bethesda Oak Hosp.*, 79 Ohio App.3d ;613, 616-17, 607 N.E.2d 936, 939 (Hamilton Co. 1992). The existence of a reasonable basis to believe that a crime has been committed is sufficient to defeat claims of malicious prosecution and false arrest. See *id.* at 620, 607 N.E.2d at 941. See also *State v. McCrone*, 63 Ohio App.3d 831, 835-36, 580 N.E.2d 468, 471 (Lorain Co. 1989); *Melanowski v. Judy*, 102 Ohio St. 153, 156, 131 N.E. 360, 361 (1921). The issue is not whether a crime was actually committed,

but whether a reasonable basis existed for believing the accused guilty of the crime. *McFinley*, 79 Ohio App.3d at 617, 607 N.E.2d at 939.

In the case at bar it is undisputed that Mr. Rood and Mr. Huffman both held forth during the October 24 meeting after having been ruled out of order repeatedly, and their conduct unquestionably "interfere[d] with the due conduct of [the] meeting." See Ohio Rev. Code § 2917.12. Our review of the videotape of the meeting persuades us that the existence of probable cause to arrest and prosecute both men for disturbing a meeting is beyond dispute.

We also conclude as a matter of law that probable cause existed to arrest and prosecute Mr. Rood for resisting arrest. He admits that he pulled his arm away from Office Tiburzio, told him to "get your paws off me," and struggled with the arresting officers. Summary judgment was proper as to the claims of false arrest and malicious prosecution against Officer Tiburzio.

2. 42 U.S.C. § 1983

We next turn to the plaintiffs' constitutional claims against the police officers and the city, raised under 42 U.S.C. § 1983. First, Gordon Rood contends that Officers Tiburzio, Bailey, and Smith used excessive force in arresting him on October 24, thereby violating his Fourth Amendment right to be free of unreasonable seizures. The district court found for the police officers on the ground of qualified immunity. We agree that the officers were entitled to summary judgment as to this claim, but we do not reach the qualified immunity issue, having concluded as a matter of law that the plaintiffs failed to establish that the officers' conduct violated their constitutional rights.

Claims that police officers used excessive force in the course of an arrest are analyzed under a "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Assessment of the reasonableness of the force used is an objective inquiry that depends on the "facts and circumstances of each particular case, including the

severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest." *Id.* at 396.

Taking the evidence in the light most favorable to Mr. Rood, we assume that he did not try to escape policy custody; certainly his acquittal on a charge of resisting arrest would support that finding. He admits, nevertheless, that he pulled away from officers and "struggled" with them. Mr. Rood claims that the officers pulled his arms up behind his back and shoved him against a wall, causing him pain. Although this degree of force may have been unnecessary in hindsight, we conclude as a matter of law that it was not unreasonable.

> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Id.* at 396-97 (citations omitted).

No reasonable juror could find, under the circumstances presented here, that an arresting officer acted unreasonably by pulling an admittedly struggling suspect's arms behind his back and pushing him against a wall. The district court properly granted summary judgment to Officers Tiburzio, Bailey, and Smith and the City of Westerville as to this claim.

Next, eight of the plaintiffs -- Sue Bresee, Margie Bean, Raymond Brown, Jack Keller, Margaret McIntyre, Maureen Hansen, Lou Waggoner, and Carolyn Ward -- maintain that after they left the

October 24 meeting, Officer Tiburzio prevented them from reentering and thereby violated their First Amendment rights.[3] They allege that Officer Tiburzio identified them by their "CATW" buttons as people who would not be allowed in the meeting.

The plaintiffs had a right to attend this public meeting of the local school board. A school board meeting, when opened to the public, is a limited public forum for discussion of subjects relating to the operation of the schools. See *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976). Although the government may place limitations on the time, place and manner or access to such forums, the restrictions must be content neutral and narrowly tailored to serve a significant governmental interest. See *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

> "[U]nder the...First Amendment...government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.... Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content along." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

When a school board sits publicly to conduct public business and to hear the views of citizens, it may not discriminate among speakers on the basis of the content of their speech. See *Madison Joint Sch. Dist.*, 429 U.S. at 176.

In the instant case, it is clear that the school board had opened the meeting to the public and had solicited public comments at the meeting, albeit for a limited period of time. If, as the plaintiffs allege, Officer Tiburzio excluded the plaintiffs from the meeting solely because they wore buttons indicating their association with Citizens Against Tax Waste, his action would be an impermissible

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[3] This is the only claim raised by seven of the plaintiffs.

content-based restriction on the plaintiffs' right to express themselves in a public forum.

Although the time for oral expression had already ended when the exclusion allegedly occurred, the plaintiffs' wearing of CATW buttons constituted a "silent, passive expression of opinion." See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.SD. 503, 508 (1969). Such a symbolic act is protected by the Free Speech Clause of the First Amendment. See *id.* at 505. Notwithstanding the expiration of the time for speeches by members of the public, the plaintiffs had a right to attend and to wear CATW buttons.

The district court dismissed this claim on the ground of qualified immunity. Under the qualified immunity defense, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Giving the plaintiffs the benefit of all reasonable inferences, we must determine "whether an objectively 'reasonable officer could have believed [the defendant's] conduct to be lawful, in light of the clearly established law and the information the...officers possessed.'" *Hall v. Shipley*, 932 F2d 1147, 1151 (6th Cir. 1991) quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

It was well established in 1988, when the cause of action arose, that members of the public had a right to attend a public school board meeting. See *Madison Joint Sch. Dist.*, 429 U.S. at 176; *Mosley*, 408 U.S. at 96. A reasonable police officer in the position of Officer Tiburzio would have known that he could not exclude members of the public from a school board meeting solely on the basis of their viewpoints. Therefore, we conclude that summary judgment should have been denied as to the claims against

Officer Tiburzio arising from his alleged exclusion of the plaintiffs from the October 24 meeting.[4]

The district court acted properly in granting summary judgment in favor of the City of Westerville as to this claim. A municipality cannot be held liable for the acts of an individual employee or official unless the individual acted pursuant to an official policy of the defendant body. *Monell v. Dept. of Social Services*, 436 U.S. 658, 691 (1978). To establish municipal liability for an injury resulting from a municipal policy, moreover, the plaintiffs "'must identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.'" *Coogan v. City of Wixom*, 820 F.2d 170, 176 (6th Cir. 1987) (quoting *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984) (en banc, *cert. denied*, 472 U.S. 1016 (1985)). The plaintiffs have not produced any evidence indicating that Officer Tiburzio's decision to exclude people from the board meeting was part of a city policy of restricting access to public meetings.

Finally, the plaintiffs claim that the police and the school board conspired to prevent them from expressing their views. An action for civil conspiracy may be brought under 42 U.S.C. § 1983. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

> "A civil conspiracy is an agreement between two or more person to injure another by unlawful action.... All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant." *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985).

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[4] The plaintiffs have not alleged any facts indicating that the school board was involved in a decision to exclude them from the meeting. To the extent the complaint raises such a claim, summary judgment in favor of the school board was proper.

A complaint alleging a civil rights conspiracy must be supported by specific facts showing the "existence and scope of the alleged conspiracy." *Slotnick v. Staviskey*, 560 F.2d 31,33 (lst Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978). Nothing in the record of the case at bar supports a claim that the police conspired in any way to deprive the plaintiffs of their constitutional rights. Summary judgment was proper as to the police defendants and the City of Westerville on the claim of civil conspiracy.

C

We next consider the plaintiffs' claims against the school board members in their individual and official capacities. An action against a government official in his official capacity is an action against the governmental entity he represents. See *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). A municipality is a "person" subject to suit under 42 U.S.C. § 1983. *Monell*, 436 U.S. AT 690. Ohio's local school boards are treated as "municipalities" as far as amenability to suit is concerned. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (Ohio local school board is effectively a municipality, not a state, for Eleventh Amendment purposes).

As to Margaret McIntyre's claim that Dr. Husarik and Mr. Hayfield violated her First Amendment right to distribute literature opposing the school levy, it is not alleged that the actions of Husarik and Hayfield on the evening of April 24 were part of a school board "policy" of discouraging the distribution of campaign literature. See *Coogan v. City of Wixtom*, 820 F.2d at 176. We therefore construe this particular claim as one against Hayfield and Husarik in their individual capacities only.

To state a claim under 42 U.S.C. § 1983, the plaintiff must establish that (1) the defendants acted under color of state law and (2) the officials' conduct deprived the plaintiffs of a right secured by the Constitution or a federal statute. *West v. Atkins*, 487 U.S. 42, 48 (1988). A public official acts under color of state law when he has "exercised power 'possessed by virtue of state law and made possible

only because the wrongdoer is clothed with the authority of state law.'" *Id.* at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

There is a genuine issue of material fact as to whether Hayfield or Husarik acted under color during their confrontation with Mrs. McIntyre. In this confrontation, which apparently took place on school property, Hayfield and Husarik, who were public school officials, allegedly took Mrs. McIntyre's flyers, told her to leave the school property, and threatened to call the police if she did not comply. A reasonable juror could conclude that the men were undertaking to act in an official capacity.

At issue of fact also remains whether the defendants' conduct deprived Mrs. McIntyre of her First Amendment right to free speech. Mrs. McIntyre sought to communicate her views about a public matter. This kind of communication "is entitled to the greatest constitutional protection." *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975). The government may not seize presumptively protected expressive materials without a prior determination that the speech is unlawful. See *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66-67 (1989) (seizure of books inappropriate prior to judicial determination of obscenity).

The facts alleged in this case bear some similarity to those in *Glasson v. City of Louisville*. In *Glasson*, police officers seized a poster from Ms. Glasson because it was critical of the President of the United States. We held that the police officers' actions deprived Ms. Glasson of her First Amendment right because they interfered with her expressive activity on the basis of the content of her speech. Similarly, Mrs. McIntyre alleges that the defendants' conduct interfered with the expression of her political views and that the interference was motivated by the content of her speech.

A threat to call the police made for the purpose of dissuading Mrs. McIntyre from expressing her views on the levy could have had a chilling effect on the exercise of her First

Amendment rights. Where one is threatened with arrest or prosecution for exercising his right to expression, thereby chilling the exercise of that right, a constitutional violation may occur even with an arrest or prosecution. See *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions"_); *Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir. 1994) (police officer violated plaintiff's First Amendment rights by issuing citations and warnings with motive of deterring plaintiff's expressive activity).

We note that in order to succeed at trial on such a theory, Mrs. McIntyre will have to establish that her expression was in fact deterred or chilled by the defendants' conduct. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm...." *Laird v. Tatum*, 408 U.S. at 13. See also *Macko v. Byron*, 760 F.2d 95, 97 (6th Cir. 1985) (§ 1983 plaintiff must establish an actual constitutional violation, not merely a threat of violation). Moreover, she must establish that the defendants threatened to call the police because of the content of her message and not merely because they were concerned about a violation of election laws. See *Sloman v. Tadlock*, 21 F.3d at 1469-70 (defendant's motive is relevant to ascertaining whether his conduct violated First Amendment); *Mozzochi v. Borden*, 959 F.2d 1174, 1179 (2nd Cir. 1992) (same).

Dr. Husarik and Mr. Hayfield argue that to the extent that their conduct may have violated Mrs. McIntyre's constitutional rights, they are protected by the doctrine of qualified immunity. We disagree. Mrs. McIntyre's right to distribute political literature was clearly established at the time of these events. We conclude that a reasonable school official would have known that he could not interfere with a citizen's campaign efforts against a tax levy by confiscating her materials and threatening to call in the police.

Gordon Rood maintains that the action of Dr. Miller, president of the school board, in filing charges of disrupting the September 12 meeting constituted malicious prosecution. But

charges filed in good faith and in reliance on the advice of a prosecuting attorney who is aware of the known material facts cannot form the basis of a claim of malicious prosecution. See *Donohoe v. Burd*, 722 F.Supp. 1507, 1520 (S.D. Ohio 1989), *aff'd*, 923 F.2d 854 (6th Cir. 1991). In the case at bar Columbus chief prosecutor James Fais viewed the videotape of the September 12 meeting, independently concluded that there was probable cause to file charges against Mr. Rood, and so advised Dr. Miller. Dr. Miller filed the charge in reliance on this advice. Although Mr. Rood was ultimately acquitted, the state court judge found it to be "a borderline case" -- and the advice of the prosecutor would provide a complete defense to the malicious prosecution claim in any event.

The plaintiffs challenge the Board's policy of limiting the number of speakers, limiting the duration of their comments, and giving preference to new speakers. We conclude that this policy was a permissible content-neutral restriction on the time, manner, and place of the plaintiffs' speech and did not violate the plaintiffs' First Amendment rights. Where regulation of speech is content neutral, is narrowly tailored to serve a significant governmental interest, and leaves open ample alternative avenues for communication, it is constitutionally valid. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In this case, the board's policy did not limit speech based on its content. All speakers during the public participation period were required to comply with the policy, regardless of their viewpoint. The regulation affected the timing of the speech, not its content. The plaintiffs also had ample opportunity to express their views to the board. CATW members spoke at most school board meetings in 1988, and several levy opponents spoke during the October meetings.

Although the board instituted its new policy in 1988, when there was significant controversy over the levies, there is no evidence that the policy was aimed only at CATW members. The policy was adopted after a series of board meetings at which an unusually large number of people wished to speak. Some of the meetings were disrupted, and others ran on at great length. The policy did not

disproportionately limit the right of members of any particular group to speak.

The government has a significant interest in the orderly and efficient conduct of its business. See *Grayned v. City of Rockford,* 408 U.S. 104, 119 (1972) (city has compelling interest in undisrupted school session); *Jones v. Heyman,* 888 F/2d 1328, 1333 (11th Cir. 1989) (mayor's interest in controlling the agenda and preventing the disruption of public meetings is significant governmental interest); *Madison Joint Sch. Dist.,* 429 U.S. at 176 n.8)"plainly, public bodies may confine their meetings to specified subject matter...."); *Wright v. Anthony,* 733 F.2d 575, 577 (8th Cir. 1984) (public hearing procedure limiting speech time to five minutes per speaker was a valid time, place, and manner restriction that served a significant governmental interest in conserving time and allowing others opportunity to speak).

> "We are dealing not with words uttered on the street to anyone who chooses or chances to listen; we are dealing with meetings of the Norwalk City Council, and with speech that is addressed to that Council. Principles that apply to random discourse may not be transferred without adjustment to this more structured situation....[A] City Council meeting is...a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact." *White v. City of Norwalk,* 900 F.2d 1421, 1425 (9th Cir. 1990).

The public participation policy at issue in the instant case restricted the number of speakers and the amount of time each person could speak, but it did not limit the content of the speech or restrict the full range of expressive activity available outside the board meeting. The policy left open ample alternative opportunities for communication. The board held several meetings to hear public comment, and citizens were free to write or speak to board members outside the board meetings.

Other courts have upheld policies comparable to the one with which we are concerned here. See *Jones v. Heyman*, 888 F.2d at 1334 (upholding plaintiff's expulsion from city commissioner's meeting because plaintiff failed to follow established public participation procedures); *Wright v. Anthony*, 733 F.2d at 577 (upholding five-minute limit on public comments during a hearing). We conclude that the policy in this case was a permissible restriction on speech. Mr. Huffman and Mr. Rood clearly violated the policy, and the board did not act improperly by having them removed.

As to the remaining incidents -- Officer Tiburzio's preventing several of the plaintiffs from reentering the meeting, the arrests on October 24, and Officer Ross' alleged assault on October 29 -- there is no evidence linking the board to these events. The district court acted properly in granting summary judgment to the school board and its members as to all claims.

III

The judgment entered by the district court is **REVERSED** as to the claim that Officer Tiburzio improperly excluded plaintiffs from a public board meeting and as to the claims against defendants Hayfield and Husarik regarding seizure of the fliers. The judgment is **AFFIRMED** as to all other claims and all other defendants. The case is **REMANDED** to the district court for further proceedings not inconsistent with this opinion.

ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part:

Although I concur in most of this opinion, I must respectfully dissent from the finding that Dr. Husarik and Mr. Hayfield are not entitled to qualified immunity for their actions in regard to their confrontations with Mrs. McIntyre prior to April 27 and April 28, 1988, informational meetings. The majority concludes that there are genuine issue of fact which prevent the granting of summary judgment on qualified immunity grounds, particularly the

issue of whether the defendants' conduct actually deprived Mrs. McIntyre of her First Amendment right to free speech. I would hold that it did not, and that, although the conduct of these defendants was probably reprehensible, it was not unconstitutional.

It is undisputed that on each of these occasions these defendants took only some of McIntyre's pamphlets, that on at least one of these evenings they took no pamphlets from McIntyre herself, that they merely threatened to call the police but did not do so, and that neither of these defendants had either the power or the authority actually to arrest or prosecute McIntyre. The majority analyzes these facts under *NAACP v. Button*, 371 U.S. 415 (1963); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.),*cert. denied*, 423 U.S. 930 (1975); and *Sloman v. Tadlock*, 21 F.3d 1462 (9th Cir. (1994). I believe that there are crucial distinctions between this case and each of those cited.

The principle from *NAACP v Button* which the majority applies to this case is the Supreme Court's statement that "[t]he threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions." 371 U.S. at 433. But in that case the Court was not addressing the actions of someone who threatens to call the police. The quoted language is part of a paragraph which addresses a *statute's* inhibitory effect and in that regard, the Court said,

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Id. (citations omitted). Here , the action which the majority describes as a threat of sanctions is the mere threat, which was never carried out, by two school board members to call the police. This is simply not comparable to a statue which, if applied to plaintiff, would operate as sanction.

The majority opines that the facts in *Glasson v. City of Louisville* bear some similarity to the facts here. I disagree. In *Glasson*, it was the *police* who seized the plaintiffs' only poster. Not only was the plaintiff in *Glasson* left without any graphic representation of the point of view she sought to express, she was deprived of it by the law enforcement authorities themselves, who had the power to arrest her if she resisted. But in the case before us, it is undisputed that only some of McIntyre's pamphlets were taken by the defendants, the defendants were not police or other law enforcement officers, and although the defendants threatened to call the police if McIntyre continued to pass out the leaflets, she did continue her activity, but they did not call the police.

Finally, in *Sloman v. Tadlock*, the Ninth Circuit addressed claims against both a police defendant and a civilian defendant. The defendant police officer in that case, motivated by the content of the plaintiff's political speech, had participated in the arrest of the plaintiff, who was not violating any law at the time. 21 F.3d. at 1466. The court held that qualified immunity was no warranted because a reasonable jury could have found that the plaintiffs' political activity was the motivating factor in the officer's decision to *issue warnings and citations*, that the warnings and citations were groundless, and that the officer's conduct had chilled the plaintiff's expression. *Id.* at 1470. The court further held that the civilian defendant had actually *signed a citizen's complaint* that led to the arrest of the plaintiff, and that there was genuine issues as to whether the civilian defendant had acted in concert with the police and whether the civilian was motivated by the content of the plaintiff's political speech. *Id.* at 1474. But in the case before us, the defendants could neither issue warnings or citations nor did anything whatsoever to cause a warning or citation to be issued by the police.

I do not question that McIntyre's conduct was protected by the First Amendment. While I disagree with the majority's apparent disregard for the fact that the pamphlets McIntyre was passing out were in clear violation of an Ohio law which has not, even today, been held to be unconstitutional,[1] I do not believe that issue is dispositive here. And I assume, for purposes of this analysis, that defendants Husarik and Hayfield were clothed with state authority. What I cannot accept is the conclusion of these defendants' actions reasonably should have been viewed by them as violating McIntyre's First Amendment rights. McIntyre does not allege that the defendants left her with insufficient literature to cover the meetings effectively, and as noted above, she does not allege that she stopped passing out the literature either evening. The majority cites no precedent, and I have found none, that would support a holding that these school board members should have known that if they took *any* of McIntyre's materials they were violating her First Amendment rights.

Neither can I join the majority's view that a threat to call the police, even when made by public school officials on public school property, is equivalent to a threat of arrest or prosecution, such that these school board members should have known that when they threatened to call the police they were violating McIntyre's First Amendment rights. It is, after all, the duty and function of the police to determine whether an arrest should be made or citations issued. I think we set an alarming precedent when we acknowledge the potential for § 1983 liability for merely calling the police. And in this case, the majority agrees that these officials may be found liable merely for threatening to call the police. In short, since I do not believe that any reasonable school board official should have known that when he took some of her leaflets and threatened to call the police, regardless of his motives in doing so, he was violating McIntyre's First Amendment rights, I would affirm the district court's judgment granting qualified immunity to these defendants.

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[1] The issue has been argued before the United States Supreme Court but no decision as of this date has been issued.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MAUREEN HANSEN, *et al.*,
Plaintiffs,

-v-

Case No. C-2-89-607
JUDGE SMITH

WESTERVILLE CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*,
Defendants.

OPINION AND ORDER

Rendered on January 28, 1993

Plaintiffs bring this action under 42 U.S.C. § 1983 and state law. They assert claims of deprivation of Constitutional rights, false arrest and malicious prosecution, and assault and battery. Plaintiffs' claims are based, *inter alia*, on defendants' alleged misconduct in interfering with plaintiff's efforts to oppose a local property tax levy. This matter is before the Court on the motion for summary judgment filed by the Police Defendants (Doc 44.)[1]

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[1] There are two broad categories of defendants in this case. The first category includes various Westerville City School Officials: Board Members Debbie Collins, Donna Baker, David Coffman, and Tom Fawcett (sued in their official capacities only); and Board Member Don Miller, Superintendent Ernest Husarik and Assistant Superintendent Michael Hayfield (sued in their individual and official capacities). The second category consists of Westerville Police Officers Richard Tiburzio, Ted Smith, Randall Bailey and Don Ross (all sued in their individual and official capacities). The Court will refer to the first category as the "Board Defendants" and the second category as the "Police Defendants".

The Court also notes that the City of Westerville, which originally joined in the summary judgment motion, has since been voluntarily dismissed from this action.

I

Plaintiffs' claims against the Police Defendants arise from two separate incidents. The first occurred on October 24, 1988 at a Westerville School Board meeting. The second happened on October 29, 1989 at the corner of Schrock Road in Westerville.

A

The Westerville School Board held a meeting on October 24, 1988. The Board planned to discuss at this meeting a proposed school tax levy increase that was on the ballot of an upcoming local election. The plaintiffs, who were against the levy,[2] attended the meeting. People who supported the levy also attended the meeting. The Board hired defendant Tiburzio to be at the meeting to prevent a breach of peace between the pro- and anti-levy forces.

A local television station recorded the meeting, and a copy of the video tape has been submitted as a joint exhibit. The Court has viewed the tape in its entirety.

Plaintiffs Huffman, Rood, Hansen and Waggoner each attempted to speak during the meeting. Defendant Don Miller, the Board president, ruled that the plaintiffs were out of order on each occasion.

Huffman was the first plaintiff to seek to address the board at the October 24 meeting. Defendant Miller ruled him out of order. Huffman, however, continued to attempt to address the Board. Defendant Tiburzio then approached Huffman. He asked him to leave several times. Huffman voluntarily left with Tiburzio after several requests. Tiburzio informed Huffman as the two approached the chamber doors that he was placing him under arrest for disrupting a lawful meeting.

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[2] The plaintiffs were members of "Citizens Against Tax Waste," a group that opposed the levy.

Plaintiff Rood next approached the podium and tried to address the Board. Board Defendant Miller ruled him out of order. Rood, however, persisted in speaking to the Board in a loud voice.

Defendant Tiburzio then approached Rood and asked him to leave the chambers. Rood refused because he wanted to read something to the Board. Tiburzio then attempted to lead Rood out of the chambers, holding his arm. Rood repeatedly tried to pull away from Tiburzio. Rood shouted to Tiburzio, "get your paws off me" more than once. Tiburzio told Rood that he was under arrest for disturbing a lawful meeting as he led him away.

Police Defendants Bailey and Smith, both Westerville police officers, then arrived and joined Tiburzio. Tiburzio told Bailey and Smith that he had placed plaintiff Rood under arrest. Rood continued to try to walk away. Bailey and Smith attempted to hold Rood by his arms. Rood tried to pull away from them, thrashing his arms. In doing so, Rood bruised Bailey's left arm. Westerville Police Sergeant Jeffrey Jones then arrived on the scene. He started to handcuff Rood. Rood then ceased struggling. Sergeant Jones directed, upon Rood's request, that Bailey and Smith release Rood. Plaintiffs Huffman and Rood then went to the Westerville Police station without being handcuffed.[3]

Back in chambers, plaintiffs Hansen, Ward, Waggoner, Sue Bresee, McIntyre and Bean all approached the podium. The Board ruled them out of order. Hansen and Waggoner, however, continued to try to address the Board. Tiburzio eventually approached the plaintiffs and asked them to leave the chambers. The plaintiffs complied and left without incident.

At one point, some unidentified police officers apparently accidentally knocked down plaintiff Brown. Brown was not injured and acknowledged the contact was not intentional.

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[3] Plaintiffs Huffman and Rood were later found not guilty on all charges from the October 24,1988 incident.

B

The second incident occurred at the corner of State Street and Schrock Road in Westerville on October 29, 1988. Plaintiffs Carl Huffman and Jerry Bresee, as well as several unidentified persons, were at this location demonstrating against the tax levy.

Police Defendant Ross, a Westerville Police officer, was on duty that day. Shortly after Ross reported for duty, Dispatcher Ande Pritchard issued a dispatch on a compliant that several individuals were creating a disturbance at the corner of Schrock and State Street by making obscene gestures and provoking remarks at passersby. The dispatch indicated that two members of Citizens Against Tax Waste, Pete Huffman and Gordon Rood, were possibly involved. Ross responded to the dispatch.

Police Defendant Ross arrived at the scene and approached the demonstrators. As Ross approached the group, he had his PR-24 baton in his right hand. Ross held his baton because he was concerned for his safety. His concern was based on his knowledge that Pete Huffman and Gordon Rood had recently been arrested and that several officers were required to effect the arrest.

Once he had approached the group, Ross asked to speak to Huffman and Rood. He also advised Carl Huffman and Jerry Bresee about the complaint he had received. Ross remained at the scene for another five to ten minutes. He observed no activity to substantiate a disorderly conduct charge, and therefore left. The demonstrators continued their demonstration after Ross left.

II

In considering this motion, the Court is mindful that the standard for summary judgment "mirrors the standard for a directed verdict under [Rule 50 (a))], which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citing *Brady v. Southern Ry. Co.*, 320 U.S.

476, 479-80 (1943)). Thus the Supreme Court concluded in *Anderson* that a judge considering a motion for summary judgment must "ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented." 477 U.S. at 252.

Rule 56(c) of the Federal Rules of Civil Procedure provides a pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogators, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In essence, the inquiry is whether the evidence presented a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-52.

Such an inquiry necessarily implicates the evidentiary standard of proof that would apply at the trial on the merits. As a result, the Court must view the evidence presented through the prism of the substantive evidentiary burden. Rule 56(e), therefore, "requires the nonmoving party to go beyond the pleadings and their own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

In *Banks v. Rockwell "International N. Am. Aircraft Operations*, 666 F. Supp. 1053 (S.D. Ohio 1987) (Graham, J.), this district enunciated the importance of granting summary judgments in

appropriate situations by stating as follows: "Although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* at 1056 (citing *Celotex Corp. v. Catrett*, 477 U.S. at 327, (quoting Fed. R. Civ. P. 1)); *Anderson*/ 477 U.S. at 252.

Thus, the mere existence of a scintilla of evidence in support of a plaintiff's claim is insufficient--there must be evidence upon which a jury could reasonably find for the plaintiff. *Anderson*, 477 U.S. at 252. Having discussed the Rule 56 standard of review, the Court now turns to the merits.

III

The plaintiffs seek relief under U.S.C. § 1983, alleging that the Police Defendants violated plaintiff's rights under the First, Fourth and Fourteenth Amendments to the U.S. Constitution. The plaintiffs also assert state law claims of assault, battery, false arrest and malicious prosecution.

The Police Defendants advance four grounds for summary judgment. First, they argue that they are immune under Ohio's sovereign immunity statute, O.R.C. § 2744.01 et seq. Second, they contend that their actions were supported by probable cause. Third, the Police Defendants maintain that they are entitled to qualified immunity. Lastly, they assert that they were acting pursuant to the advice of counsel with respect to plaintiffs' malicious prosecution claims.

A

The Court will proceed to address the Police Defendants' sovereign immunity argument. Sovereign immunity applies, if at all, only to the plaintiffs' state law claims. The parties agree that the Police Defendants were acting within the scope of their employment at all relevant times for the purpose of O.R.C. § 2744.01(B).

O.R.C. § 2744.03(A)(6) states as follows:

> In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by an act or an omission in connection with a governmental or proprietary function, the following defense or immunities may be asserted to establish nonliability:
> (6) In addition to any immunity of defense referred to in division (A)(7) of this section and in circumstances not covered by that division, the employee is immune from liability unless one of the following applies:
> (a) His acts or omissions were manifestly outside the scope of his employment or official responsibility;
> (b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
> (c) Liability is expressly imposed upon the employee by a section of the Revised Code.

Plaintiffs do not argue that exceptions of (a) or (c) apply. Rather, plaintiffs contend that summary judgment cannot be granted on the ground of sovereign immunity because genuine issues of material fact exist as to whether the exception of O.R.C. § 2744.03(A) (6) (b) applies. That is, plaintiffs assert that they have produced evidence that the Police Defendants acted with malicious purpose, in bad faith, in wanton manner, or in a reckless manner. Plaintiffs also suggest that the state of mind issues such as these are inappropriate for summary judgment.

The Court has carefully reviewed the evidence submitted by the plaintiffs, including the deposition testimony, affidavits and the jointly submitted video tape.[4] The Court concludes that even when the evidence is viewed in a light most favorable to the plaintiffs, a reasonable trier of fact could not infer that any of the Police

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[4] The Police Defendants have filed a motion to strike certain portions of plaintiffs' affidavits that are not based on personal knowledge, contradict earlier deposition testimony, or are otherwise inadmissible. Plaintiffs' filed a response to the motion on January 20, 1993. The Court will simply disregard those portions that are inadmissible. Given the volume of documents, the Court will not make a point by point ruling.

Defendants acted with malice or bad faith, or that their actions were wanton or reckless. Indeed, the competent evidence consistently reveals that the Police Defendants acted with restraint and professionalism at all relevant times. Furthermore, plaintiffs assertion that the issues presented by the O.R.C. § 2744.03(a) (6) (b) must be resolved by a jury is simply incorrect. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)(Complex cases and state of mind issues are not inappropriate for summary judgment). The Court therefore holds that the Police Defendants are immune from liability under O.R.C. § 2744(A) (6) with respect to plaintiffs' state law claims.

B

The Police Defendants also argue that defendant Tiburzio had probable cause to arrest and charge the plaintiffs Rood and Huffman, and that he is therefore entitled to summary judgment in his favor with respect to those plaintiffs' claims based on false arrest. The Court had carefully reviewed the videotape of the October 24, 1988 meeting as well as the other evidence pertaining to this issue. The Court concludes that as a matter of law probable cause existed to arrest and charge plaintiffs Rood and Huffman for disturbing a lawful meeting in violation of O.R.C. § 2917.12.[5] Defendant Tiburzio is therefore entitled to summary judgment in his favor with respect to the false arrest and malicious prosecution claims of plaintiffs Rood and Huffman.

C

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[5] That section states:

(A) No person, with purpose to prevent or disrupt a lawful meeting, procession, or gathering, shall do either of the following:

(1) Do any act which obstructs or interferes with the due conduct of such meeting, procession, or gathering;

(2) Make any utterance, gesture, or display which outrages the sensibilities of the group.

(B) Whoever violates this section is guilty of disturbing a lawful meeting, a misdemeanor of the fourth degree.

The Police Defendants next argue that they are entitled to qualified immunity in connection with plaintiffs' constitutional claims brought under 42 U.S.C. § 1983.

The perimeters of the qualified immunity defense as it currently exists were established in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Under *Harlow*, government officials are immune from liability for civil damages insofar as their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. 457 U.S. at 818. Whether an official will prevail in his qualified immunity defense depends upon the objective reasonableness of his conduct as measured by reference to clearly established law. *Id.* The qualified immunity standard is purely objective, and the official's subjective state of mind is irrelevant. *Davis v. Scherer*, 468 U.S. 183 (1984). Whether the law at the time of the alleged action was clearly established in favor of the plaintiff and whether the defendant is protected by qualified immunity are questions of law for the court to decide. *Ohio Civil Service Employees Assoc. v. Seiter*, 858 F.2d 1171 (6th Cir. 1988).

"[W]hether an official protected by qualified immunity may be personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, . . . assessed at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1986)(quoting *Harlow v. Fitzgerald*, 457 U.S. at 819, 818).

> The operation of this standard however depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of

> *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy the balance that our cases strike between the interests and vindication of citizens' constitutional rights and in public officials' effective performance of their duties, by making it impossible for officials [to] anticipate when their conduct may give rise to liability for damages. . . . It should not be surprising therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence a more relevent sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing violates that right.* This is not to say that an official action is protected by qualified immunity *unless the very action in question* has previously been held unlawful, . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. at 639-40 (cites, quotes and footnote omitted). Thus, "the proper inquiry in not whether the claimed right exist in the abstract, but whether a reasonable official would have known that the challenged conduct violated that right." *Gossman V. Allen*, 950 F.2d 338, 341 (6th Cir. 1991)

The Court has already determined that as a matter of law probable cause existed to arrest and file charges against plaintiffs Huffman and Rood. To the extent these plaintiffs' 1983 claims are based on the allegations of false arrest or malicious prosecution, they must fail. Plaintiffs remaining claims against the Police Defendants are for the alleged violation of plaintiffs' First Amendment rights, and for the alleged use of excessive force in connection with the arrest of plaintiffs Rood and Huffman.[6]

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[6] Plaintiffs appear to have abandoned their claim based on the allegation that unidentified officers knocked plaintiff Brown over. In any event, there is insufficient evidence in the record on this claim to withstand summary judgment.

The Court will first address qualified immunity in connection with plaintiffs' excessive force claims. It is not disputed, nor can it be, that the prohibition against the use of excessive force to effect an arrest was recognized in the abstract in October 1988. In May 1989 the U.S. Supreme Court issued a decision clarifying the standard to be applied to Fourth Amendment excessive force claims. *Graham v. Connor*,. 490 U.S. 386 (1989) The Court explained:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather that with the 20/20 vision of hindsight. . . . The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, . . . nor by the mistaken execution of a valid search warrant on the wrong premises . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers, . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary to a particular situation.

Id. at 396-97 (emphasis added, cites and quotes omitted).

The Court finds that a reasonable officer in the circumstances would not have known that the force used to arrest plaintiffs Rood and Huffman was so excessive as to have violated their Fourth Amendment rights. It is not enough that the concept of a prohibition against excessive force existed in the abstract in October 1988. Moreover, as *Graham* pointed out soon after the incident that gave rise to this case, it is not enough that there was physical contact, or even that some force was used. The Court finds that even when the evidence is viewed in the light most favorable to plaintiffs, the force used in this case, to effect a lawful arrest supported by probable cause, was not of such a nature that a reasonable officer

would have known that he was violating the Fourth Amendment rights of Rood and Huffman.[7] The Police Defendants are therefore entitled to qualified immunity with respect to plaintiffs excessive force claims.

The remainder of plaintiffs' § 1983 claim is based on their allegation that the Police Defendants violated their First Amendment rights. Once again, even when the evidence is viewed in the light most favorable to plaintiffs, the Court finds that a reasonable officer would not have believed that his actions violated plaintiffs' First Amendment rights. With respect to the October 24, 1988 incident, a reasonable officer in the circumstances would not have known that asking the plaintiffs to leave the meeting was unlawful. The Court already ruled that probable cause existed for the arrests of Huffman and Rood. The other plaintiffs, like Huffman and Rood, approached the podium, and were ruled out of order. In spite of this, plaintiffs Hansen and Waggoner continued to try to address the Board. A reasonable police officer would not have known that asking the plaintiffs to leave was a violation of their rights in these circumstances.[8]

The Court likewise finds that a reasonable officer would not have known that Police Defendant Ross's actions on October 28,

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[7] The Court notes that, although not dispositive, the plaintiffs have failed to introduce any evidence that Huffman or Rood were injured.

[8] The Court notes that although it is not necessary that there had been a previous cases on point, plaintiffs have failed to draw the Court's attention to any U.S. Supreme Court or Sixth Circuit cases even remotely similar to the instant case. Contrary to plaintiffs' assertion, *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1975) does not resemble the instant case at all, and, at most, stands for the principle that a public employer cannot preclude speech at a public meeting on the basis that the speaker was nonunion.

Moreover, it was reasonable for the officers to rely, to some extent, on the well-established principle that the First Amendment right to free speech is subject to reasonable time, place and manner restriction. See *Heffron v. Int'l Soc. for Krishna Conc.*, 452 U.S. 640, 647 (1981). Here, the officers were proceeding under content-neutral Ohio laws, and there is no competent evidence that their actions with respect to the plaintiffs were content driven.

1988 violated any of the plaintiffs' constitutional rights. The plaintiffs do not appear to dispute in their memorandum contra the Police Defendants' version of this incident. In any event, it is not disputed that the protest continued after Ross left.

For all of these reasons, the Court concludes that the Police Defendants are entitled to qualified immunity with respect to plaintiffs' § 1983 claims.[9]

D

The Police Defendants next argue that they are entitled to summary judgment with respect to plaintiffs' state and federal claims to the extent they are based upon alleged malicious prosecution. They contend that the charges were filed against plaintiffs Huffman and Rood in reliance upon the advice of counsel.

Ohio courts recognize "advice of counsel" as a defense to claims of malicious prosecution. See *Bacon v. Patera*, 772 F.2d 259, 265 (6th Cir. 1985) (applying Ohio law); *Donohue v. Burd*, 722 F.Supp. 1507, 1520 (S.D. Ohio 1989) (same); *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App. 3d 163, 499 N.E.2d 1291 (1985).

> Advice of a lawyer is a complete defense to an action for malicious prosecution if the defendant made a full, fair and complete disclosure to a lawyer of all the material facts of which the defendant had knowledge, necessary to obtain accurate legal advice, and tending to prove or disprove the criminal charge, and if the criminal case was filed thereafter in reliance and in good faith on the advice of that lawyer.

Donohue, 722 F.Supp at 1520.

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[9] The Court is well aware that qualified immunity applies only to claims brought against a person in his individual capacity. Nevertheless, in light of the fact that the City of Westerville has been voluntarily dismissed from this action, it would appear that no viable claims remain against the Police Defendants in their official capacities. See *Brandon v. Holt*, 469 U.S. 464, 472 n.21 (1985).

Plaintiffs argue that the advice of counsel defense does not apply here because Tiburzio filed the charges against plaintiffs Huffman and Rood on the evening of October 24, 1988, before obtaining the advice of the prosecutor. The Police Defendants acknowledge that Tiburzio filed the charges before obtaining advice, but point out that it is undisputed that Tiburzio ultimately fully informed the prosecutor, James Fais, of all the relevant facts, and that the prosecutor informed the City of Westerville of his belief that probable cause existed for the arrest and prosecution of Huffman and Rood. Thus, the Police Defendants argue that the continued prosecution of Huffman and Rood was in good faith based upon the advice of counsel.

It is not necessary for the Court to reach the issue of whether advice of counsel applies to the facts of the instant case. The Court's rulings on sovereign immunity, probable cause and qualified immunity are dispositive. Nevertheless, if the Court were to reach the issue, it would be inclined to agree with the position of the Police Defendants. The Court believes that the Ohio courts would extend the defense in the circumstances presented in this case, especially in light of the prosecutor's detailed opinion letter, in which he expressly concluded that prosecution of the charges was proper. The Court expresses no opinion, however, as to whether it would follow or apply the Eleventh Circuit's intervening cause defense.

IV

Based on the foregoing, the Police Defendants' motion for summary judgment (Doc. 44) is GRANTED.

IT IS SO ORDERED.

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MAUREEN HANSEN, et al.,
Plaintiffs,

-v- Case No. C-2-89-607
JUDGE SMITH

WESTERVILLE CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,
Defendants.

OPINION AND ORDER

Rendered on February 19, 1993

Plaintiffs bring this action under 42 U.S.C. § 1983 and state law. They assert claims of deprivation of Constitutional rights, false arrest and malicious prosecution, and assault and battery. Plaintiffs' base their claims, *inter alia*, on defendants' alleged misconduct in interfering with plaintiffs' efforts to oppose a local property tax levy. This matter is before the Court on the motion for summary judgment filed by the Board Defendants (Doc 44.)[1] Also before the Court is the Board Defendants' motion to strike/notice of objection.[2]

I

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[1] The Court has already granted the Police Defendants' summary judgment motion. The Court will, however, address or clarify a number of matters relevant to the Police Defendants' motion in this opinion.

[2] The Board Defendants assert that the affidavits plaintiffs submitted with their memorandum contra contain inadmissible hearsay, legal conclusions, speculation, conclusions not based on personal observation, and the like. The Court agrees that the affidavits are flawed in these respects. The Court also agrees with plaintiffs, however, that it is not necessary to literally "strike" the affidavits or any portions thereof. The Court will simply disregard those portions that are improper.

This action concerns plaintiffs' efforts, and the Board Defendants' alleged interference with plaintiffs' efforts, to oppose proposed school property tax levies that appeared on the ballot in May, August and November 1988. The first two levies failed; the third passed.

A. Plaintiff McIntyre's Distribution of Leaflets on April 27 and 28, 1988

On April 27 and 28, 1988, plaintiff Margaret McIntyre distributed leaflets opposing the proposed levy. She did so while on Westerville School property, *viz*, two middle schools.

On April 27, McIntyre handed out leaflets on a sidewalk outside of Blendon Middle School. Board Defendants Husarik and Hayfield eventually arrived. McIntyre apparently gave a leaflet to Hayfield. He says that after reading the leaflet, he told McIntyre that it violated election laws because it did not identify the source of the information it contained. McIntyre avers that Husarik and Hayfield threatened to call the police. Husarik and Hayfield deny this. McIntyre also alleges that Hayfield "snatched my leaflets out of the hand of my son's girlfriend." McIntyre affidavit, para. 9. Plaintiffs do not dispute that McIntyre continued to distribute leaflets after Husarik and Hayfield had gone inside the school.

The next day, on April 28, plaintiff McIntyre again distributed leaflets, but at a different school, Walnut Springs Middle School. McIntyre again gave Hayfield a leaflet. Hayfield maintains that as before, he read the leaflet and told McIntyre that the leaflet violated election laws. He says that McIntyre said she understood the law and that she continued to hand out leaflets. McIntyre contends that Hayfield again threatened to call the police. McIntyre affidavit, para. 12.

Plaintiffs do not dispute that the Ohio Elections Committee later found that McIntyre's pamphlets violated election laws.

B. The September 12, 1988 School Board Meeting

Several of plaintiffs' claims concern plaintiff Gordon Rood's efforts to speak at the September 12, 1988 Westerville School Board meeting.[3] Plaintiffs claim that the Board improperly interfered with Rood's free speech, and that they later filed false criminal charges against him for disrupting a lawful meeting.

Rood, as well as a number of the other plaintiffs, attended the September meeting. The meeting included a public participation period. Before the public participation period began Board Defendant Miller announced that the Board would limit the public participation period to forty-five minutes. Five people spoke during this period. A number of the speakers opposed the levy. Rood did not seek to address the board during this period. When the public speaking period was over, Miller announced that the Board would take a five minute break and continue with the next item on the agenda.

After the recess, Miller again stated that the Board would be moving on to the next item on the agenda. Plaintiff Gordon Rood then interrupted the meeting, insisting that the Board continue to allow spectators to speak. The Board declined to do so. Rood then began to pace back and forth in front of the podium for more than two and one-half minutes. In doing so, he prevented Chris Wanner, Director of Pupil Services, from making his presentation as scheduled. In response to Rood's conduct, the Board mistakenly voted to adjourn the meeting.

The meeting eventually resumed. Miller then stated that the Board would allot another fifteen minutes for public participation after the scheduled agenda was completed. Rood, however, again interrupted the meeting, insisting that spectators be allowed to speak at that time. This interruption lasted about two minutes.

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[3] Most of the September 12, 1988 Board meeting was videotaped, and a copy of the videotape has been submitted as a joint exhibit. The court has viewed the tape in its entirety.

During this second interruption, plaintiff Hansen approached the podium and, without having been recognized, began to speak. The Board ruled her out of order. She nevertheless continued to speak. The Board permitted her to complete her comments.

After Hansen was done, the scheduled speaker, Chris Wanner, again tried to make his presentation. Rood, however, interrupted Wanner and prevented him from making his presentation by refusing to yield. After about one minute, a Westerville City Police Officer escorted Rood from the meeting hall.

The Board allowed an additional period of public participation after the meeting. Rood, as well as four other people, then addressed the Board without further incident. Of the ten people who spoke during the public participation period on September 12, 1988, five opposed the levy.

Several months later, the Board filed a criminal charge of disrupting a lawful meeting against Rood with respect to his conduct at the September 12 meeting. The prosecutor provided the city of Westerville with a letter on January 6, 1989, in which he expressed his opinion that probable cause existed to charge Rood with disrupting a lawful meeting based on the videotape of the September 12, 1988 meeting. After plea bargaining, Rood entered a plea of no contest to the lesser offense of disorderly conduct. Municipal Judge Sheward, however, found Rood not guilty after viewing the videotape.

C. The October 24, 1988 School Board Meeting

The Board changed its public participation policy in response to the events of the September 12, 1988 meeting. The Board announced at its September 26, 1988 meeting that beginning on October 10, 1988, anyone who wanted to speak to the Board would have to complete a sign-up sheet. The Board also stated that it would begin strictly to observe the five minute limit for individual

speakers and the forty-five minute time limit for the participation period. The Westerville Board of Education "Communique" of September 26, 1988 and a local newspaper both announced the new policy.

Several of the plaintiffs, including Huffman and Rood, indicate in their deposition testimony that they were aware of and understood the policy. Plaintiffs Bresee, Ward, Bean, Huffman, D. Waggoner, Hansen and Rood all filed out sign-up sheets for the public participation periods scheduled for the October 10 or 24, 1988 meetings.

The Board implemented the policy, without incident, at the October 10, 1988 meeting. Plaintiffs Bean, Hansen, Huffman, Rood and D. Waggoner spoke at the October 10 meeting pursuant to the policy.

Plaintiffs Rood, Huffman, Hansen and Waggoner attended the October 24, 1988 meeting. More people signed up for the public participation period for that meeting than there was time allotted. Board Defendant Miller announced this fact to the spectators at the beginning of the public participation period. He also told them that because of the circumstances he would lean toward recognizing people who had not spoken before. No one voiced an objection to Miller's approach at that time.

Twelve speakers then addressed the Board: six who were for the levy and six who opposed it. Miller then announced that there was time for two more speakers. He recognized Del Waggoner (husband of plaintiff Lou Waggoner), an opponent of the levy, and a Mr. Sandman.

After the anti-levy person concluded his remarks, plaintiff Huffman approached the podium and began to speak without having been recognized. Board Defendant Miller ruled Huffman out of order. Huffman, however, refused to yield the podium and continued to speak. After a few moments, Police Defendant Tiburzio approached Huffman and asked him several times to leave. Huffman

then voluntarily left with Tiburzio. As the two approached the chamber doors, Tiburzio informed Huffman that he was placing him under arrest for disrupting a lawful meeting.

As soon as Huffman and Tiburzio left the podium, plaintiff Rood approached the podium and began to speak.[4] Defendant Miller ruled him out of order. Rood nevertheless remained at the podium and continued to speak. Police Defendant Tiburzio then approached Rood and asked him to leave. Rood refused to do so, indicating that he wanted to read something to the Board. Tiburzio then attempted to lead Rood out of the chambers, holding Rood's arm. Rood repeatedly tried to pull away from Tiburzio. He shouted "get your paws off me" more than once.

After removing Huffman and Rood from the meeting, Tiburzio, by that time joined by Police defendants Bailey and Smith, arrested Rood and Huffman. The Police Defendants charged both Rood and Huffman with disrupting a lawful meeting, and charged Rood with an additional charge of resisting arrest.[5] There is absolutely no evidence from which a reasonable trier of fact could infer that any of the Board Defendants planned or directed the arrest of Huffman or Rood, or the filing of charges against them in connection with the October 24, 1988 Board meeting.

The meeting continued after Tiburzio led Rood and Huffman away. After the last speaker finished his comments, defendant Miller stated that the public comment portion of the meeting was over. Plaintiffs Hansen and L. Waggoner then tried to address the Board. Plaintiff Waggoner had not completed a sign-up sheet as required by the Board's policy. Miller ruled Hansen and L. Waggoner out of order. Waggoner responded by acknowledging that she was out of order. Police Defendant Tiburzio eventually approached Hansen and

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[4] Rood had not signed up to speak at the October 24, 1988 Board meeting.

[5] To the extent it may have been unclear in the Court's previous opinion, the Court finds that as a matter of law probable cause existed for charging Rood with resisting arrest. This finding is based upon the competent evidence contained in the record, including that portion of Rood's conduct recorded on the jointly submitted videotape of the October 25, 1988 meeting.

Waggoner and asked them to leave. They complied and left without incident.

Once outside the meeting, the Police Defendants apparently prevented number of the plaintiffs to reentering.[6]

In June 1989 a jury found plaintiffs Huffman and Rood not guilty on all charges stemming from the October 24, 1988 Board meeting.

D. The Street Protest of October 29, 1988

Plaintiffs argue that the Board Defendants were somehow responsible for or involved in the actions of Police Defendant Ross on October 29, 1988. On that day, plaintiffs Carl Huffman and Jerry Bresee were demonstrating against the tax levy at the corner of Schrock Road and State Street. Ross approached the two in responding to a dispatch. The dispatch indicated that several individuals were creating a disturbance at that location.

The Court finds that there is absolutely no evidence from which any rational trier of fact could infer a connection between any of the Board Defendants and the conduct of Ross on October 29, 1988.

II

The procedure for granting summary judgment is found in Fed. R. Civ. p. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show

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[6] To the extent it may not have been clear in the previous opinion, the Court finds that given the disruptive behavior of Rood, Huffman, Hansen and Waggoner, a reasonable officer in the circumstances would not believe that his actions violated plaintiffs' clearly established rights.

> that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby, Celotex* and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479. In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting *Liberty Lobby*, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita*, 475 U.S. at 586). Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the

court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

III

A.

The Board Defendants first argue that they are entitled to summary judgment on plaintiffs' claim of "civil conspiracy." They assert that plaintiffs have not pleaded such a claim with requisite particularity in the complaint, and that there is, in any event, no evidence to support such a claim.

The Court agrees that the complaint does not fairly plead a conspiracy claim. More importantly, however, plaintiffs have adduced nothing more than unsupported innuendoes and conclusory allegations with respect to their conspiracy claim. The Police Defendants are entitled to summary judgment in connection with plaintiffs' claim of civil conspiracy.

B.

The Board Defendants next argue that they are entitled to summary judgment with respect to the claims arising out of the events of April 27 and 28, 1988. As the Board Defendants correctly point out, even according to plaintiff McIntyre's account of the incident, Board Defendants Husarik and Hayfield did not threaten to arrest or prosecute McIntyre. Rather, they allegedly told her they were going to call the police. Plaintiffs do not dispute that McIntyre did not stop handing out leaflets after the alleged threat, but continued to remain on the school property passing out her materials as long as she desired. There is no evidence that the incidents "chilled" her speech in any way.[7] It is not disputed the police were never called to the scene on either occasion.

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[7] Indeed, the undisputed evidence demonstrates that McIntyre's political activities have remained extensive.

The alleged "grabbing" of pamphlets likewise did not seem to interfere with McIntyre's activities. It apparently did not cause her to run out of pamphlets. Furthermore, McIntyre alleges that the pamphlets were grabbed not from her, but from her son's girlfriend. McIntyre's son's girlfriend is not a plaintiff in this action.

Lastly, although perhaps not dispositive of this issue, it is worth noting that the Ohio Elections Commission ultimately ruled that McIntyre's leaflets did, in fact, violate the law. Under these circumstances, the Court concludes that plaintiffs have failed to come forward with sufficient evidence to establish any constitutional violation in connection with the events of April 27 and 28, 1988. The Board defendants are therefore entitled to summary judgment on all of plaintiffs' claims arising from these incidents.

C.

The Board Defendants next argue that they are entitled to summary judgment with respect to plaintiffs' claims that the Police Defendants barred them from reentering the meeting after the arrest of Huffman and Rood. The Court agrees that plaintiffs have failed to adduce any competent evidence linking the Board Defendants with the Police Defendants' decision to prevent some of the plaintiffs from reentering the meeting. Defendants are therefore entitled to summary judgment in connection with these claims.

D.

The Board Defendants also contend that summary judgment should be granted in their favor on claims arising from the October 29, 1988 street protest. The Court finds that there is no evidence to link the Board Defendants with this incident. They are therefore entitled to summary judgment with respect to plaintiffs' claims arising from this incident.

E.

The Board Defendants further assert that as a matter of law, the Board's public participation policy was a constitutionally valid time, place and manner regulation. The Court finds that there is no evidence that the policy was discriminatorily applied. Indeed, the undisputed evidence shows that the Board was careful to give equal time to pro- and anti-levy forces during the public participation period. It is also worth noting that the Board gave many of plaintiffs ample opportunity to speak at other Board meetings. There is no evidence that the Board Defendants prevented plaintiffs from utilizing other avenues of expression.[8]

It cannot seriously be argued that the policy did not serve a compelling governmental interest in preserving order at the Board meetings. Even if the Court were to conclude that the policy was flawed in some respect,[9] it would nevertheless find that there is no evidence that any such flaw was the reason plaintiffs were prevented from speaking at the October 24, 1988 meeting. In particular, the Court finds that as a matter of law, the forty-five minute time limit and the limit of five minutes per person were constitutionally valid regulations. The Court also fails to detect any *per se* constitutional infirmity with Miller's decision to give preference to people who had not yet spoken. Plaintiffs have not introduced any evidence that Miller did not choose people who had not yet addressed the Board. For all of these reasons, the Board Defendants are entitled to summary judgment on this issue.

F.

The Board Defendants also contend that they are entitled to summary judgment on plaintiffs' false arrest claims. Specifically, the Board Defendants maintain that there is no evidence to support

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[8] The plaintiffs stress the importance of the October 24, 1988 Board meeting, pointing out that it was the last meeting before the November election, and that it was televised. This is undercut somewhat by Plaintiffs' failure to allege that they were unable to themselves secure, during this period, access to air time on the same channel that broadcast the meetings.

[9] It appears that the policy required prospective speakers to provide a brief outline of their comments.

plaintiffs' allegation that the Board was somehow involved with or responsible for Police Defendant Tiburzio's decision to arrest plaintiffs Huffman and Rood.

Plaintiffs rely heavily on a hand motion or "signal" Husarik apparently gave Tiburzio. This signal for help, however, falls far short of evidence that the arrests were prearranged. Plaintiffs have failed to adduce any competent evidence that any of the Board Defendants were either involved in or responsible for Tiburzio's decision to arrest Huffman and Rood. The Board Defendants are therefore entitled to summary judgment on these claims.

G.

The Board Defendants further argue that they should be granted summary judgment on plaintiffs' malicious prosecution claims relating to the charge filed against Rood in connection with the September 12, 1988 meeting. The Board Defendants maintain that Miller relied upon the advice of counsel in bringing the charge of disrupting a lawful meeting, and that there was, in any event, probable cause for such a charge.

The Court has viewed the jointly submitted videotape of the September 12, 1988 Board meeting. The Court finds that there was, as a matter of law, probable cause for the filing of a charge against Rood for disrupting a lawful meeting. See O.R.C. § 2917.12.

Ohio courts recognize "advice of counsel" as a defense to claims of malicious prosecution. See *Bacon v. Patera*, 772 F.2d 259, 265 (6th Cir. 1985) (applying Ohio law); *Donohue v. Burd*, 722 F.Supp. 1507, 1520 (S.D. Ohio 1989) (same); *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App. 3d 163, 499 N.E.2d 1291 (1985).

> Advice of a lawyer is a complete defense to an action for malicious prosecution if the defendant made a full, fair and complete disclosure to a lawyer of all the material facts of which the defendant had knowledge, necessary to obtain accurate legal advice, and tending to prove or disprove the

criminal charge, and if the criminal case was filed thereafter in reliance and in good faith on the advice of that lawyer.

Donohue, 722 F.Supp at 1520.

The Court further finds that the undisputed evidence conclusively establishes that the charge was filed with the advice of counsel after a full, fair and complete disclosure. For the above reasons, the Board Defendants are entitled to summary judgment on plaintiffs' malicious prosecution claims arising from the charge filed against Rood for disrupting the September 12, 1988 Board meeting.

H.

The Board Defendants next argue that they are entitled to summary judgment on plaintiffs' malicious prosecution claim arising out of the charges filed in connection with the October 24, 1988 Board meeting. These charges were filed by the Police Defendants. The Court finds that plaintiffs have failed to adduce any competent evidence from which a reasonable trier of fact could infer that any of the Board Defendants either directed or were otherwise involved in the filing of the criminal charges against Rood or Huffman stemming from the October 24, 1988 Board meeting. Moreover, the Court has already found that probable cause existed for the filing of these charges. The Board defendants are therefore entitled to summary judgment on these claims.

I.

The Board Defendants also maintain that they are entitled to immunity under O.R.C. §§2744.03(A)(1), (2) and (3),[10] and

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[10] That section provides in relevant part:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses may be asserted to establish non-liability:

2744.03(A)(6).[11] The Court finds that the complained-of conduct clearly falls within the purview of O.R.C. §2744.03.

Furthermore, plaintiffs have failed to adduce any competent evidence to controvert the Board Defendants' assertions that they did not act recklessly, in bad faith, or with malice. The court finds that there is no evidence in the record from which a rational trier of fact could infer that any of the Board defendants acted with this level of culpability. The Board Defendants are therefore entitled to the immunity afforded by O.R.C. §§2744.03(A)(1), (2) and (3), and

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(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim was required by law or authorized by law, or if the conduct was necessary or essential to the exercise of powers of the political subdivision of the employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the office or position of the employee.

[11] That section states in relevant part:

In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish non-liability.

...

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division, the employee is immune from liability unless one of the following applies:

(a) His acts or omissions were manifestly outside the scope of his employment or official responsibility;

(b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Liability is expressly imposed upon the employee by a section of the Revised Code.

2744.03(A)(6) as a matter of law. Immunity under these sections applies only to plaintiffs' state law claims.[12]

J.

The plaintiffs concede that to the extent an underlying claim does not exist, a party cannot recover damages for emotional distress. The Board Defendants are entitled to summary judgment on plaintiffs' claims of emotional distress because plaintiffs' underlying claims are subject to dismissal on other grounds.

K.

Plaintiffs also concede that they may not recover punitive damages against any of the Board Defendants in their official capacities. The Board Defendants are therefore entitled to summary judgment to the extent the complaint asserts such a claim.

L.

The Board Defendants next argue that defendants Miller, Hayfield and Husarik are entitled to qualified immunity. Plaintiffs have sued these defendants in their individual capacities.

The perimeters of the qualified immunity defense as it currently exists were established in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Under *Harlow*, government officials are immune from liability for civil damages insofar as their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. 457 U.S. at 818. Whether an official will prevail in his qualified immunity defense depends upon the objective reasonableness of his conduct as measured by reference to clearly established law. *Id.* The qualified immunity standard is purely objective, and the official's subjective state of mind is irrelevant. *Davis v. Scherer*, 468 U.S. 183 (1984). Whether

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[12] The Board Defendants concede that immunity under O.R.C. §2744.03(A)(6) does not, by definition, apply to plaintiffs' claims of malicious prosecution.

the law at the time of the alleged action was clearly established in favor of the plaintiff and whether the defendant is protected by qualified immunity are questions of law for the court to decide. *Ohio Civil Service Employees Assoc. v. Seiter*, 858 F.2d 1171 (6th Cir. 1988).

"[W]hether an official protected by qualified immunity may be personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action,...assessed at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1986) (quoting *Harlow v. Fitzgerald*, 457 U.S. at 819, 818).

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory provision. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee or immunity into a rule of pleading. Such an approach, in sum, would destroy the balance that our cases strike between the interests in vindication of citizens' constitutional rights in public officials' effective performance of their duties, by making it impossible for officials [to] anticipate when their conduct may give rise to liability for damages. ... It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence a

> more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,...but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. at 639-40 (cites, quotes and footnote omitted). Thus, "the proper inquiry is not whether the claimed right existed in the abstract, but whether a reasonable official would have known that the challenged conduct violated that right." *Gossman v. Allen*, 950 F.2d 338, 341 (6th Cir. 1991).

The Court finds that in the circumstances presented in this case, reasonable officials in the positions of Miller, Hayfield and Husarik would not believe that there actions violated any clearly established rights the plaintiffs may have had. It is not sufficient that plaintiffs First and Fourth Amendment rights may have existed in the abstract. The Court holds that Miller, Hayfield and Husarik are entitled to qualified immunity as a matter of law.

M.

The Board Defendants also assert that defendant Miller is entitled to absolute legislative immunity for claims pertaining to the manner in which he conducted the subject Board meetings. The Board Defendants admit, however, that the U.S. Supreme Court has never expressly afforded this immunity in this kind of case. Because Miller is entitled to summary judgment on other grounds, the Court declines to reach this issue. If it were to reach the issue, however, this Court would be inclined to extend immunity to the circumstances presented in this case. See *Collison v. Gott*, 895 F.2d 994, 1005-10 (4th Cir. 1990) (concurring opinion by Wilkinson, J.).

N.

The Board Defendants next argue that the defendant Board is entitled to summary judgment because plaintiffs have failed to state a claim against the Board under *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). The Board is entitled to summary judgment on other grounds, so it is not necessary to reach this issue. The Court would note, however, that Miller was arguably acting pursuant to a Board policy, namely the public participation policy. On the other hand, there is no evidence that the conduct of Hayfield and Husarik was pursuant to any custom or policy of the Board.

O.

Lastly, the Board Defendants assert that defendants Miller, Hayfield and Husarik are entitled to summary judgment with respect to plaintiffs' claims for punitive damages. The Court finds that plaintiffs have failed to adduce competent evidence from which a rational trier of fact could infer that defendants Miller, Hayfield or Husarik acted with callous or reckless disregard for plaintiffs' rights. These defendants are therefore entitled to summary judgment on plaintiffs' punitive damages claims.

IV.

Based on the foregoing, the Board Defendants' motion for summary judgment (Doc. 45) is **GRANTED**. The clerk shall enter a final judgment in favor of all defendants, against plaintiffs, dismissing plaintiffs' complaint with prejudice. Costs shall be taxed against plaintiffs.

IT IS SO ORDERED.

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

CITY OF WESTERVILLE
DIVISION OF POLICE
WITNESS STATEMENT

LOCATION 21 State Street South
NAME Tiburzio II. Ptl. Richard J. #441.
DATE 10-24-88 ADDRESS 29 State Street S.
TIME 2112 Hours. PHONE (H) (W) SSN DOB
RE Disturbing a Lawful Meeting OCCUPATION Police Officer

While working special duty at the Westerville Board of Education meeting, the following incidents occurred: Donald Miller (School Board President) had just concluded the forty-five minute public discussion portion of the meeting. While trying to move on with the meeting, a citizen later identified as Carl H. Huffman approached the school board podium and demanded to be heard. Mr. Miller stated to Mr. Huffman that he was out of order and requested him to be seated. Mr. Huffman disregarded the request. He was asked repeatedly to sit down, but ignored the request and continued to disrupt the meeting. I had been viewing the meeting in the clerk's office where the meeting was being taped for cable use. The office is directly outside the Council Chambers Room. I exited the taping room and approached the double doors which leads directly into the room. The doors were standing open. I stood by the hall and observed Mr. Huffman still disrupting the meeting. I did not enter the room until I was motioned to do so by School Superintendent Dr. Husarik. Dr. Husarik wanted Mr. Huffman out of the meeting. Prior to approaching Mr. Huffman, I radioed for assistance due to the instability of the disrupted meeting. I then approached Mr. Huffman and identified myself as a police officer. Mr. Huffman did not pay any attention to me. I asked Mr. Huffman to leave the podium and come with me out into the lobby. Mr. Huffman acknowledged me this time stating "Wait a minute and I'll go with you." I again asked Mr. Huffman to leave the podium, but he wouldn't do so. Mr. Huffman finally complied with my request and was escorted to the lobby. Mr. Huffman was advised that he was under arrest by this officer. While escorting Mr. Huffman out to the lobby[1] another subject approached the podium. This subject

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[1] This reproduction of the Witness Statement is as to wording only. In the original, the signature of Ptl. Richard J. Tiburzio, II #441 appears at this point in the narrative, which is the end of the first page.

was identified as Gordon Rood. Mr. Rood too started disrupting the meeting requesting to be heard. Again, Mr. Miller informed Mr. Rood that he was out of order and requested him to be seated. Mr. Rood did not acknowledge this request. He continued to disrupt the meeting and would not be seated. I again was asked to approach the podium by School Superintendent Dr. Husarik. Dr. Husarik wanted Mr. Rood to be removed from the meeting. I asked Mr. Rood to please leave the podium and go with me to the lobby. Mr. Rood stated, "Let me finish this and I will go with you." Mr. Rood was reading a book to the council members. I again asked Mr. Rood to leave the podium and come out to the lobby with me. Mr. Rood ignored me. I then reached over to Mr. Rood and asked him again to come with me. Mr. Rood flung his arms away from me stating, "Keep your paws off of me." He did this several times as I was walking him out towards the lobby. I advised Mr. Rood at this time, "You are under arrest." Mr. Rood said, "I don't care if I am under arrest, you keep your paws off of me."

Ptl. Randy Bailey #452 and Ptl. Ted Smith #465 arrived on the scene and were walking towards the Council Chambers. I had advised both officers that Mr. Rood and Mr. Huffman were under arrest. I pointed out both gentlemen to the officers. While attempting to affect an arrest on Mr. Rood, he resisted the lawful arrest of himself by flailing his arms preventing the officers from handcuffing him. Mr. Rood kept stating, "Keep you paws off of me; don't you touch me!" Sgt. Jeff Jones #448 arrived on the scene while Ptl. Bailey and Ptl. Smith were trying to handcuff Mr. Rood. Mr. Rood stated to Sgt. Jones, "Tell these officers to let me go, and I will walk over to the Police Department." This request was ordered to all officers and both Mr. Rood and Mr. Huffman were escorted over to the Police Department.

Charges of Resisting Arrest and Disturbing a Lawful Meeting were filed against Mr. Rood. Charges of Disturbing a Lawful Meeting were filed against Mr. Huffman. Mr. Huffman complied with this officer's request once being informed he was under arrest.

Witness statements were also obtained from the Westerville Board members as to what transpired.

Also taken as evidence was a copy of the taped meeting.

LCI - Low Bid - complete revaluation given
We took lowest responsible bidder - to protect public & and trust
LCT ~~Read~~ filed intent of legal action
Employees top ~~for~~ Council not - former Pres. of Bd
Following 2 Hr legal deposition & suggested action
5.5 Mil levy - Need it will pass - Don't do/pass

Restricted H.S. Lower E/Student - Being discussed by staff - 2 or Board members have made comment to superintendent - no decision

Spring Sports - Same contract has been made remains as being current

1. Cepek	5 Robbins
2. Nanaitus	4
3 Huffman	10
4. Sandman	11. MacDermott
5. Brant	
6. Rood	
7.	

POSSIBLE SPEAKERS

* City Council - Paramucka
① Jack Sandman
① Jill Naughton, David Cepek
* Finance Committee - Sue Robertson (?) contact if YES minority before commissioners
1st ① Mac McDermott
① John Brant - parent, OSBA
① John Robbins - parent, business man
Jim Bates
Ned Musselman - wife - teacher
Mark Lerner Bricker & Eckler
Army 7.
① Gordon
① Bell
Maureen

A-59

Supreme Court, U.S.
FILED
MAY 17 1995
OFFICE OF THE CLERK

(2)

No. 94-1696

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MAUREEN HANSEN, *et al.*,

Petitioners,

v.

WESTERVILLE CITY SCHOOL DISTRICT,
BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioners are members of a loosely-knit organization known as Citizens Against Tax Waste ("CATW"), which was formed in 1988. (R.* *: Huffman Dep. at I-110; R. *: Rood Dep. at 52). They opposed several levies sought by the Respondent Westerville City School District Board of Education ("the Board") in 1988, two of which were defeated in May and August of that year. In opposing the levies, members of CATW appeared and spoke at every Board meeting between August of 1988 and May of 1989. (R. *: Rood Dep. Ex. 2.; R. *: Huffman Dep. at II-57-59).

The events relevant to this Petition began at a public meeting of the Board on September 12, 1988 at which Petitioner Rood (among other Petitioners) was in attendance. Prior to that meeting, Respondent Miller, then President of the Board, announced that there would be forty-five minutes allotted for public participation. During the "Communications" section of the meeting, five speakers (many of whom opposed the levy) were recognized to speak and consumed the allotted time. (R. 45, Ex. 4, Claphan Aff. Ex. D: Minutes Sept. 12, 1988 Board Meeting at 8294). Significantly, Mr. Rood did not seek to address the Board during this time. (R. 45, Ex. 1, Miller Aff. at ¶ 6). When that time had elapsed, the President announced the conclusion of the public participation period, stating that after a five minute

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* This record entry reflects that several depositions were filed with the District Court and journalized on June 24, 1992, however, these entries were not assigned docket numbers.

break the meeting would then resume with the next agenda item. (R. 44, Jt. Ex. 1; R. *: Rood Dep. at 289).

Upon return from the recess, Mr. Rood interjected and insisted that the Board continue to permit spectators to address the Board. (R. 44, Jt. Ex. 1; R. *: Rood Dep. at 120). When the Board declined to accede to his demands, Rood yelled and paced about the podium for over two and one-half minutes, preventing Mr. Chris Wanner, the Director of Pupil Services, from making his presentation in accordance with the Board's agenda. (R. 44, Jt. Ex. 1.)

After a temporary adjournment due to Rood's behavior, Dr. Miller stated that the Board would allow an additional fifteen minutes for public comment after the meeting. (Videotape Sept. 12, 1988 Board Meeting (R.44, Jt. Ex. 1"). Rood, however, again loudly interrupted the meeting to demand that people who wished to speak be permitted to do so at that time. (Id.) His interjection at that point continued for nearly two minutes. (Id.)

During this interruption, Petitioner Hansen approached the podium and began to speak without having been recognized. (Id.) She was ruled out of order, but continued to speak. (Id.) The presiding officer at the Board meeting permitted her to complete her remarks. (Id.) Following her comments, Mr. Chris Wanner again attempted to make his presentation as scheduled, but Rood again interrupted him, preventing him from doing so. (Id.) After about one minute had passed and Rood refused to yield to Mr. Wanner (the recognized speaker), a Westerville City police officer escorted Plaintiff Rood from the hall. (Id.)

At the conclusion of this meeting an additional period

for public participation was allowed, during which another five speakers addressed the Board, including Mr. Rood. (R. 44, Jt. Ex. 1; R. 45, Ex. 4, Claphan Aff. Ex. D: Minutes Sept. 12, 1988 Board Meeting at 8231.) Of the ten (10) speakers who addressed the Board, five (5) were members of CATW. (R. 45, Ex. 8, Orr Dep. Ex.: Speaker Charts).

The second event occurred at a public Board meeting held on October 24, 1988. Because of dramatically increased public participation at the Board meetings, the Board instituted, at the meeting of October 10, 1988, a new public participation policy which opened the floor for public comment for forty-five minutes and required those in attendance to state their desire to speak on a sign-up sheet available prior to the meeting. All of the Petitioners knew of the procedure and understood that compliance was necessary in order to speak. See, e.g., R. *: Rood Dep. at 70; R. *: L. Waggoner Dep. at 103; R. *: Ward Dep. at 48; R. *: Bean Dep. at 87; R. *: S. Bresee Dep. at 63-64.

Due to the large number of people who had indicated a desire to address the Board by submitting a sign-up sheet, however, there was insufficient time to accommodate all who wished to speak. Consequently, Board President Miller stated that not all who wished to speak could be accommodated, and that preference would be given to those who had never spoken before. (R. 44, Jt. Ex. 2: Videotape Oct. 24, 1988 Board Meeting ("R. 44, Jt. Ex. 2")). Dr. Miller also reiterated the ground rules for participation. (R. 44, Jt. Ex. 2).

A roughly equal number of pro- and anti-levy individuals spoke during the public participation period that

evening. Near the end of the meeting, Dr. Miller announced that time would permit only two more speakers, and recognized Petitioner Del Waggoner, a well-known CATW member, allowing him to speak. Upon the conclusion of Mr. Waggoner's remarks, Mr. Huffman, who was not among those recognized to speak and then took the podium. (R. *: Huffman Dep. at II-69; R. *: Rood Dep. at 349-50). Despite repeatedly being ruled out of order by Dr. Miller, Mr. Huffman refused to yield. Instead, he continued to protest until receiving an answer to his question, at which time he left the room voluntarily with Respondent Tiburzio, a Westerville Police Officer. (R. *: Huffman Dep. at II-76-77). Mr. Huffman was later arrested for disturbing a lawful meeting.

Immediately following Petitioner Huffman's departure, Petitioner Rood, who had spoken at most meetings since April, 1988, (R. *: Rood Dep. at 55-56), commandeered the podium and refused to yield despite repeatedly being ruled out of order.[1] (Id. at 295, 315; R. 44: Jt. Ex. 2). Mr. Rood was escorted from the meeting by Westerville Police Officer Tiburzio. Both in and outside the auditorium, Petitioner Rood struggled with Officer Tiburzio and was arrested for disturbing a lawful meeting and for resisting arrest. (R. *: Tiburzio Dep. at 93, 109-110; R. *: Huffman Dep. (12/21/91 Dep.) at 6-8). Several members of the group followed Messrs. Huffman and Rood to the foyer and, after the arrests were made and the pair were removed

[1] It is undisputed that Petitioner Rood failed to submit a sign-up sheet and was not recognized to speak during the Board's public participation period.

from the building, returned to the meeting. (R. *: Bean Dep. at 166-67; R. *: Ward Dep. at 28).

After the Petitioners returned from the foyer, the final speaker recognized by the Board, Jack Sandman, was completing his statement. (R. *: Ward Dep. at 26, 30). At that time, despite the announcement that the public comment period was closed, (R. *: Bean Dep. at 61-62), Petitioner Hansen approached the podium, began to speak, and refused to yield despite being ruled out of order. (R. *: L. Waggoner Dep. at 111, 119; R. *: Hansen Dep. at 121). She was then escorted from the room, though she was not placed under arrest. (R. *: Bean Dep. at 175; R. *: Tiburzio Dep. at 126-27). As Petitioner Hansen was led from the auditorium, several other members of the group left, for a second time, to observe the activities in the foyer. (R. *: Bean Dep. at 176). While in the foyer, members of the group continued to talk among themselves of the possibility of being granted permission to speak in the meeting despite the fact that the public comment period had expired. (Id. at 177-79). Officer Tiburzio stood nearby and within hearing during this conversation. (Id. at 177).

After conversing, Petitioners reentered the auditorium hoping to persuade the Board to allow additional public comment. (Id. at 180-81). Lou Waggoner then took the podium, began speaking, and was ruled out of order. (Id. at 181-82). Three uniformed officers then entered the auditorium and escorted the Petitioners to the foyer and requested them to leave the premises. (Id. at 184, 186). None of the Petitioners attempted to reenter the auditorium for a third time. (Id. at 188).

ARGUMENT

I. Certiorari Should Be Denied Because Petitioners Do Not Raise Issues Of Overriding Public Importance.

In determining whether it will exercise its discretion to review a case, this Court considers, inter alia, whether "a United States court of appeals has rendered a decision in conflict with another United States court of appeals on the same matter," or whether a "United States court of appeals has decided a question of federal law which has not been, but should be, settled by this Court. . . " Rules of the Supreme Court of the United States 10.1(a), (c).

The Petitioners concede that none of these standards is met in this case. First, they admit that the Sixth Circuit correctly stated the applicable standard for summary judgment. Petition in Support ("Pet.") at 25. The "Petitioners have no quarrel with [the standard articulated by the Sixth Circuit] as it appears to be a reasonable statement of the current rule." Id. Thus, the Petitioners do not argue that the law of summary judgment in the Sixth Circuit is in any way defective or inconsistent with the decisions of this Court. See Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989).

Nor is there any issue of general application to justify review in this case because the Petitioners state that their "disagreement with the Sixth Circuit is that they repeatedly failed to apply the law of summary judgment." Pet. at 25. There is no claim that this case is but one instance of a systematic failure of the Sixth Circuit to apply the law of

summary judgment or that the case raises recurring themes the treatment of which is inconsistent among the United States courts or that is in need of clarification. Indeed, the Petitioners focus exclusively on the peculiar facts of this case. Supreme Court review is particularly inappropriate, however, where the primary issues raised are academic or episodic. See Rice v. Sioux City Mem. Park Cemetery, 349 U.S. 614 (1955).

II. The Sixth Circuit Correctly Applied The Law Of Summary Judgment And The Petitioners Suffered No Constitutional Deprivation.

Summary judgment may issue where there is no genuine issue as to any material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Material" facts are those "that might affect the outcome of the suit under the governing law. . . . Factual disputes that are irrelevant or unnecessary will not be counted." Id. Moreover, a dispute is not "genuine" unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. A nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

"In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." Liberty Lobby, 477 U.S. at 254. A plaintiff may not defeat summary judgment on a conspiracy claim "by merely asserting that the jury might . . . disbelieve the defendant's denial." Id. at 256. Instead, where

allegations of conspiracy are directly controverted by affidavit evidence, the burden under Rule 56(e) shifts to the plaintiff to adduce significant probative evidence to support the claim of conspiracy. Collins v. Walden, 613 F. Supp. 1306, 1317 (D.C. Ga. 1985).

A. The Petitioners' "Disputed Facts" Are Not Material.

The various facts claimed to be in dispute are not material to resolution of the case because the Petitioners cannot show that they suffered any constitutional deprivation at the hands of the Board or the individual Board Respondents. This is because the Board acted pursuant to a valid time, place, and manner public speaking policy which the Petitioners violated. Thus, even assuming the truth of the Petitioners' allegations as the Sixth Circuit did, Petitioners fail to show that they suffered any harm.

1. First Amendment Claims of Rood and Huffman: Removal From Meeting.

Petitioners Huffman and Rood assert that their First Amendment rights were violated by the application of the Board's public participation policy and their consequent removal from the meeting of October 24, 1988. However, because the Board's public participation policy was a content-neutral regulation of speech, was narrowly tailored to serve a significant governmental interest, and allowed alternative avenues of communications, it is constitutionally valid. Clark

v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Petitioners' failure to comply with the procedures of the policy caused their expulsion from the meeting.

a. The Board's Public Participation Policy Is A Valid Time, Place, Manner Restriction.

The Board policy provides for a maximum of 30 minutes of unscheduled lay participation, five minutes per speaker. Id.[2] Prior to the October 24, 1988 meeting, the policy was modified to allow forty-five minutes of public comment and to provide for a sign-up procedure for those who wished to speak.

To constitute a valid time, place, and manner restriction, the Board's policy may not be based upon either the content or the subject matter of the speech. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981). The principal inquiry is whether the regulation has been adopted because of "disagreement with the message it conveys" or whether it is unrelated to the content of the expression. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). A policy need not be the least restrictive or intrusive means of obtaining the interest to be considered "narrowly tailored" as long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation" and the regulation is "not substantially

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[2] Other courts have upheld similar content-neutral regulations. See White v. City of Norwalk, 900 F.2d 1421 (9th Cir. 1990); Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989); Wright v. Anthony, 733 F.2d 575 (1984); Tannenbaum v. City of Richmond Heights, 663 F. Supp. 995 (E.D. Mo. 1987).

broader than necessary to achieve the government's interest." Id. at 798-99. Finally, the policy must leave open "alternative channels for communication of the information." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

The Board's public participation policy serves a legitimate purpose without reference to the content of speech. First, all speakers must comply with the Board's procedures irrespective of the proposed topic. The only limitation placed on a speaker is the time each is allowed to speak. The mere limitation on the number of individuals who may speak neither advances nor inhibits the communication of a particular point of view because it restricts the timing, not the content, of speech. Because the purpose of the policy was to balance the community's interest in the efficient conduct of official business with the Board's interest in the maintenance of orderly and informative public meetings, the policy is valid. Petitioners present no competent evidence establishing that the policy was adopted or enforced for any purpose other than to serve these interests. Moreover, the undisputed facts show that the application of the policy resulted in a balanced presentation of opposing views at all meetings. Accordingly, their claims must fail. See Tannenbaum v. City of Richmond Heights, 663 F. Supp. 995, 997 (E.D. Mo. 1987 (rejecting challenge to constitutionality of ordinance because it did not prevent plaintiff from speaking based upon "content of her message," but rather on "the timing of the [] speech.").

Petitioners claim that the Board's time limit policy disproportionately limited their access to speak publicly at

Board meetings. However, during the October 10, 1988 meeting, six of eleven persons recognized to address the Board were CATW members, including Petitioners Bean, Hansen, Huffman, Rood, and D. Waggoner. (R. 45, Ex. 8, Orr Dep. Ex.: Speaker Charts). At the October 24, 1988 meeting, six of thirteen individuals recognized were members of CATW. (R. 45, Ex. 8, Orr Dep. Ex.: Speaker Charts). Petitioners admit that the Board's policy prevented persons other than CATW members from speaking. (R. *: Rood Dep. at 122). Therefore, not only did CATW members enjoy virtual parity in speaking opportunities, no disproportionate burden devolved upon them as a result.

Even if the policy did disproportionately affect Petitioners, that alone is insufficient to invalidate the policy. When a regulation serves a legitimate objective, it is not unconstitutional simply because it has a disparate impact on a particular viewpoint. A regulation that serves purposes unrelated to content is not invalid "even if it has an incidental effect on some speakers or messages but not others." Ward, 491 U.S. at 791; see also Tannenbaum, 663 F. Supp. at 997 (rejecting plaintiff's claim that ordinance was strictly enforced against here because she failed to show that she was "singled out and compelled to comply with the law while others similarly situated ha[d] not been so compelled."). Accordingly, Petitioners' failure to adduce affirmative evidence that the Board's enforcement of the speaker and time limitations were intended to prevent anti-levy speakers from speaking or that they were applied to them differently than others who were not recognized justified summary judgment in this case.

Petitioners claim that the Board's preference to hear those who had not spoken before was an illicit restriction on their right to speak. But this provision did not restrict Petitioners since CATW members spoke at every meeting relevant to this case. And the Board obtained input from a greater number of individuals, thus expanding the scope of speech within the public participation period. See Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 290 (1984) (a "person's right to speak is not infringed when government simply ignores that person while listening to others."). As there was no content-based restriction on speech, the Board's policy was permissible.

Petitioners also argue that the sign-up policy, instituted after Mr. Rood's disruption of the September 12, 1988 meeting, was intended to limit their speech. The sole evidentiary support for this claim is that the Board had never before followed such a procedure. Yet the factual background of this case explains why strict enforcement had never before been necessary. At the August, 1988 meeting, Petitioner Huffman stated that "there had to be a good 40, 50, 60 people that talked." (R. *: Huffman Dep. at I-108). This was a result of increased public participation in the levy issue. Because of the adverse impact on the Board's ability to conduct business, new procedures had to be developed to limit the number of people who could speak. Significantly, the stricter enforcement of the policy was directed not at the content of the speech but the amount of speech. Accordingly, the evidence in this case does not support the Petitioners' contentions. Under these circumstances, the Petitioners were required to "come forward with more persuasive evidence to

support their claim than would otherwise" have been necessary. Matsushita Indus. Elec. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Their failure to do so justified the grant of summary judgment.

Petitioners argue that because the policy was implemented, in part, as a response to disruptive behavior that it was somehow constitutionally infirm. Yet content-neutral policies regulating conduct, as opposed to speech, are appropriate and do not violate constitutional precepts. White v. City of Norwalk, 900 F.2d 1421, 1426 (9th Cir. 1990) (conduct which interferes with rights of others to speak is proper subject of regulation).

Petitioners even complain that the Board controlled the progress of meetings by use of an agenda and rules of parliamentary procedure. See Pet. at 21. Yet a public body has broad authority to structure the discussion of matters it chooses to open to the public and may limit such matters as it deems reasonably appropriate. City of Madison, Jt. School Dist. v. Wisconsin Employ. Rel. Bd., 429 U.S. 167, 180 (1976). For this reason the Board's "interest in controlling the agenda and preventing the disruption of [its] meetings" are compelling interests that are well within the ambit of its constitutional authority. Jones v. Heyman, 888 F.2d 1328, 1333 (11th Cir. 1989).

The governmental interest in the orderly and efficient conduct of its business while ensuring maximum public participation is a compelling one. Grayned v. City of Rockford, 408 U.S. 104 (1972).[3] The preservation of the

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[3] See also Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989) (mayor's interest in controlling agenda and preventing the disruption of public

right of all to enjoy equal opportunity to present their views is best effectuated by reasonable restrictions which ensure that government operates efficiently:

> To deny the presiding officer the authority to regulate irrelevant and disruptive behavior at a public meeting [] would cause such meetings to drag on interminably, and deny others the right to voice their opinions.

Jones v. Heyman, 888 F.2d 1328, 1333 (11th Cir. 1989). The Board was not required to grant an unlimited right to speak.[4]

Imposing a time limit and requiring sign-up sheets as a condition for speaking accommodates the competing interests

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meeting is significant government interest); see also City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 n. 8 (1976); Wright v. Anthony, 733 F.2d 575 (8th Cir. 1984) (public hearing procedure informally limiting speech to five minutes per speaker was a valid time, place, and manner restriction that served significant governmental interest); Parker v. Merlino, 646 F.2d 848 (3d Cir. 1981) (legislative body has significant interest in limiting debate; legislative body must have ability to discharge its primary function, decision-making, in efficient manner); Kucinich v. Forbes, 432 F. Supp. 1001 (N.D. Ohio 1977) (city councilman could be suspended from body for failure to yield).

[4] Indeed,

> [w]e are dealing not with words uttered on the street to anyone who chooses or chances to listen; we are dealing with meetings of the [Board], and with speech that is addressed to [the Board]. Principles that apply to random discourse may not be transferred without adjustment to this more structured situation . . . . [the Board] meting is still just that, a governmental process with a governmental purpose. The [Board] has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the [Board] chambers intact.

White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990).

of efficiency and reasonable public participation because restrictions on conduct, as opposed to speech, leave untouched the full panoply of expressive activity. This solution strikes a balance that maximizes the number of speakers that may be heard while promoting the efficient conduct of official business. It is not enough for Petitioners to argue that allowing them to speak would not have significantly impaired the Board's ability to operate in an efficient and effective manner. Heffron v. Int'l Soc'y For Krishna Consciousness, 452 U.S. 640, 654 (1981). Rather, Petitioners must demonstrate that no disorder would have been created if the Board had allowed any and all comers to exercise a limitless right to speak. Id. They have failed even to attempt to make this showing.

The public participation period was not the exclusive means by which information could be communicated. First and foremost, the policy itself afforded all of the Petitioners ample opportunities to address the Board, as evidenced by the fact that all of them spoke at Board meetings on several occasions.[5] Second, the Board's policy does not limit individual's ability to voice concerns to the board or utilize other means to convey their views to the public. The Board

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[5] There is no question that persons opposed to the levy were allowed to speak during the public participation period during September and October of 1988. See, e.g., R. *: L. Waggoner Dep. at 36-7; R. *: Keller Dep. at 26; R. *: Brown Dep. at 13; R. *: S. Bresee Dep. at 50; R. *: J. Bresee Dep. at 13-15; R. *: Hansen Dep. at 84. Indeed, Mrs. Hansen could not identify any person who had spoken more during the public participation periods than Petitioner Rood, Petitioner Huffman, or herself. (R. *: Hansen Dep. at 164). It is delusional to suggest that the policy was administered "cut off" anti-levy speakers.

often held special meetings which were devoted completely to receiving input from the public. In addition, the Board customarily received correspondence from the public. Indeed, Petitioner McIntyre testified that she placed personal telephone calls to Board members to discuss matters of concern and submitted additional matters to the Board in writing, (R. *: McIntyre Dep. at II-70-80), and Rood freely admits that he discussed the levy with Respondent Miller before the October 24, 1988 meeting. Pet. at 16.

2. First Amendment Claims Of Remaining Petitioners: Denial Of Reentry.

The remaining Petitioners claim First Amendment violations arising from the alleged refusal to allow them to reenter the October meeting.[6] They argue that Officer Tiburzio was an employee of the Board,[7] was instructed by the Board, "engaged in his various acts in the presence of the Board," and thus conclude that his "unconstitutional" acts were somehow those of the Board. In addition, they claim

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[6] This claim is advanced by Petitioners McIntyre, Hansen, Ward, Brown, J. Bresee, S. Bresee, L. Waggoner, Keller, and Bean. Petitioner's App. Brief at 37-38.

[7] Although Officer Tiburzio's employment status is irrelevant, it is clear that he was not an employee of the Board. First, though Officer Tiburzio was assigned to cover the Board meeting, Westerville Police Chief Shaw's uncontroverted testimony was that policemen hired by entities such as the Board remain employees of the Westerville Police Department and retain the sole authority to effect an arrest on unruly individuals. (R. *: Shaw Dep. at 41-42).

that they were denied reentry solely because they were members of CATW.

First, whether Officer Tiburzio was an employee of the Board's is immaterial to the this case since respondeat superior will not create section 1983 liability absent a municipal policy or custom. Monnell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 691 (1978). Second, the Petitioners were not denied reentry; they were allowed to reenter the meeting hall twice, as a group, before reentry was barred. Supra at 5. Indeed, Mrs. Hansen was never denied reentry. Petitioners adduce no evidence that the decision to bar reentry the third time was based on the content of their speech.[8] Moreover, when reentry was finally denied, the record proves that the denial was based on Petitioners' misconduct.: Petitioners openly planned, and in fact did enter and further disrupt the meeting. Under these circumstances, the refusal to allow Petitioners to reenter was a legitimate

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[8] Petitioners offer only the edited deposition testimony of Officer Tiburzio for the proposition that he threatened Petitioners Hansen and Waggoner with arrest if they spoke against the levy. The unedited testimony conclusively refutes this contention:

> And I explained to them, I said `look, you can't do that.' I said, `If you continue to do something like that, disturb a lawful meeting, I'll have to -- I would have to arrest you at that point in time.

(R. *: Tiburzio Dep. at 121 (emphasis added)). Thus, Officer Tiburzio's testimony reflected his belief that Petitioners' conduct posed a threat to the orderly continuation of the meeting as well as to the restoration of order. (Id. at 120). That Petitioners rely upon editing the emphasized portion of Tiburzio's sworn statement out of the record belies their assertion that there is a dispute as to material facts in this case. Accordingly, the District Court correctly dismissed this portion of the case.

exercise of police power and violates no constitutional right.[9]

Even assuming that reentry should not have been denied, Petitioners fail to allege or prove that the Board had a policy or custom to exclude protesters from meetings. Indeed, CATW members spoke at all of the contested meetings of the Board. It is thus obvious that no policy or custom existed to deny entry to members of CATW.

Petitioners also attempt to impute liability to the Board by arguing that Officer Tiburzio took instructions from the Board at the October 24, 1988 meeting.[10] See Pet. at 13-15 & nn. 14, 15. However, Officer Tiburzio testified that the only "meeting" he ever had with a Board member was a brief conversation immediately prior to the September 12, 1988 meeting, which was before the change in the public participation policy. (R. *: Tiburzio Dep. at 61, 73-75). He never discussed individuals or a general policy of exclusion of CATW members. (Id. at 74-76). In addition, this testimony

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[9] See Jones v. Heyman, 888 F.2d 1328, 1332, 1334 (11th Cir. 1989) (arrest for disruptive behavior at City Commission meeting justified as reasonable to effect time, place, and manner restrictions; mayor's actions to limit speaker were reasonable attempt to enforce agenda item); Tannenbaum v. City of Richmond Heights, 663 F. Supp. 995, 997 (E.D. Mo. 1987) (arrest for disruptive behavior in city council meeting justified to enforce compliance with content-neutral restriction on speech).

[10] In their brief, the Petitioners discuss Officer Tiburzio's conduct in removing and arresting some of the Petitioners in the context of probable cause, and quote from the Sixth Circuit opinion dealing with the probable cause issue. It should be noted that the Sixth Circuit, and the Petitioners, dealt with this issue below in the context of their claim for false arrest, which they now apparently abandon. The Petitioners here raise the issue of probable cause in the context of Officer Tiburzio's independence from the Board, an issue relevant to the conspiracy claim. Pet. at 23-24.

is perfectly consistent with that of Dr. Husarik, who stated that he had not spoken with Officer Tiburzio prior to the October 24, 1988 Board Meeting. (R. 45, Ex. 2: Husarik at ¶ 8).[11] Petitioners' attempt to impute the brief discussion before the September 12 meeting to the October 24 meeting is just another example of misstating the record to induce the Court to review this case.

Petitioners also rely on Officer Tiburzio's deposition testimony to argue that he and Respondent Husarik agreed to a hand signal to trigger intervention. Pet. at 13-15 & nn. 14, 15. Yet Tiburzio specifically denied that the signal was arranged before the meeting. (R. *: Tiburzio Dep. at 81). Moreover, whether such a signal existed is irrelevant to the Petitioners who state reentry claims. Assuming, arguendo, that such a signal were prearranged, at most it would indicate a desire for intervention at the podium, it provides no support for a conclusion that there existed a policy or custom to exclude CATW members from reentering the meeting.[12] Moreover, Tiburzio testified that he drew no conclusion from

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[11] Officer Tiburzio testified:

> I asked him what my specific duties were at this -- at this function, and it was to make sure that there were no problems between the proponents, or the people that were for a school levy, and those against a school levy. And that was it.

(R. *: Tiburzio Dep. at 74-75).

[12] In addition, the officers' decision to restrain Petitioners from yet a third disruption of the meeting was justified as an exercise of reasonable police power independent of any "prearranged" hand signal by the Board.

the existence of the hand signal other than that his presence was requested. (Id. at 84-85). Based upon the very evidence Petitioners proffer to support their claim, it is at once clear that the hand signal was not prearranged and that it is, in any event, irrelevant to the Petitioners' claim for a denial of reentry.

Even if a claim were stated, Petitioners failed to adduce any evidence to support their contention. No Petitioner has provided a factual basis for the conspiracy claim.[13] The only explication of the conspiracy theory comes

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[13] Indeed, every Petitioner in this case testified that they "believed" or were of the "opinion" that a conspiracy existed. None could cite a single fact to support their subjective contention. See, e.g., R. 49, Ex. J: Bean Aff. ¶ 16; R. 49, Ex. K: J. Bresee Aff. at ¶¶ 18, 21; R. 49, Ex. L: S. Bresee Aff. at ¶ 14; R. 49, Ex. M: Brown Aff. at ¶ 22; R. 49, Ex. N: Hansen Aff. at ¶ 25; R. 49, Ex. O: Huffman Aff. at ¶¶ 34, 37; R. 49, Ex. P: Keller Aff. at ¶ 8; R. 49, Ex. Q: McIntyre Aff. at ¶¶ 19, 46; R. 49, Ex. R: Rood Aff. at ¶¶ 21, 13; R. 49 Ex. S. Waggoner Aff. at ¶ 19.

> In addition to the lack of factual basis:
> Affidavits speculating as to motivations but containing no factual support do not conform to [Rule 56(e)], and statements prefaced by the phrases "I believe" or "upon information and belief" or those made upon an "understanding" are properly subject to a motion to strike. Moreover, affidavits which contain conclusions of law, ultimate facts, assertions, arguments and inferences derived from opposing party's affidavits similarly must be disregarded'

Carey v. Beans, 500 F. Supp. 580, 583 (E.D. Pa. 1980), aff'd, 659 F.2d 1065 (3d Cir. 1981) (citation omitted). See also Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990) (admissibility of evidence on summary judgment subject to same rules governing admissibility at trial); State Mut. Life Assur. Co. v. Deer Creek Park, 612 F.2d 259, 264 (6th Cir. 1979) ("Affidavits composed of hearsay and opinion evidence do not satisfy Rule 56(e) and must be disregarded.").

from Petitioners' counsel. Where the plaintiffs' version of the facts is not presented in any deposition, affidavit, or other document on file except the pleadings, summary judgment is appropriate. R.E. Cruz, Inc. v. Bruggeman, 508 F.2d 415 (6th Cir. 1975). Petitioners' failure to identify the factual predicate to support or articulate the theory of their conspiracy claim required the Court below to dismiss their claim.

Finally, Petitioners' conspiracy claim is supported by implausible inferences. The conspiracy is said to consist of providing assurances that Petitioners would be able to speak at the October 24, 1988 meeting, only then to ignore Petitioners, thus inciting their proclivity for disruptive behavior, justifying their arrest in full view of live television, and discrediting them. See Pet. at 12-13. But the probability of such events coming to pass in the sequence proposed would require the sequential occurrence of contingent events over which Respondents could have had no control. Yet this Court advises that only "legitimate inferences from the facts" are to be construed in the nonmovant's favor, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and such inferences are only those "that a reasonable jury" would consider in reaching a verdict. Id. at 248 (emphasis added). Instead, the nonmovant "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." Anderson at 256. When the necessary inference is so tenuous that it rests merely upon speculation and

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Thus, Petitioners' affidavits are of no evidentiary value and do not support their claim of conspiracy.

conjecture, it is the duty of the court to withdraw the case from the jury." Love v. King, 784 F.2d 708, 711 (5th Cir. 1986).

B. Respondents Are Entitled To Immunity.

Respondents Miller, Hayfield, and Husarik are entitled to qualified immunity for the conspiracy claims asserted against them individually since Petitioners cannot demonstrate that they had a clearly established right to violate the public participation policy. Anderson v. Creighton, 483 U.S. 635 (1978).

C. The Seventh Amendment Issue Was Not Raised Below.

The Petitioners argue for the first time that the grant of summary judgment denied them their seventh amendment right to a trial by jury. Pet. at 28, 29. Having failed to raise this issue below, certiorari jurisdiction is inappropriate. See Patrick v. Burgett, 486 U.S. 94, 99, n. 5 (1988). In addition, it is well settled that summary judgment, properly granted, does not violate the seventh amendment. Etalook v. Exxon Pipeline Co., 831 F.2d 1440, 1447 (9th Cir. 1987).

III. CONCLUSION

The Petitioners, faced with a properly supported motion for summary judgment, produced no affirmative evidence to support their claim of conspiracy. Instead, they

proffer only conclusions and innuendo, utterly ignoring record evidence and the fact that the public participation policy provided them and other members of CATW with ample opportunity to speak at Board meetings. Thus, summary judgment was appropriately granted.

Respectfully submitted,

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No. 94-1696

In The

Supreme Court of the United States

October Term, 1994

MAUREEN HANSEN, et al.,

Petitioners,

v.

WESTERVILLE CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS OFFICER TIBURZIO, OFFICER T. SMITH, OFFICER R. BAILEY AND OFFICER P. ROSS

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BRIEF IN OPPOSITION OF RESPONDENTS OFFICER TIBURZIO, OFFICER T. SMITH, OFFICER R. BAILEY AND OFFICER P. ROSS

Respondents Tiburzio, Smith, Bailey and Ross respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit is unpublished and is included in the

appendix to petitioner's Petition at A-1. The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished and is included in the appendix to petitioners' Petition at page A-2. The opinion and order of the United States District Court for the Southern District of Ohio, Eastern Division is unpublished and is included in the appendix to petitioners' Petition at page A-25.

STATEMENT OF THE CASE

Petitioners commenced this action on July 17, 1989 under 42 U.S.C. § 1983 and state law. There are two (2) broad categories of Defendants in this case. The first category includes Westerville City School officials and school board members (hereinafter referred to as "Board Respondents"), and the second consisting of these Respondents, Westerville Police Officers Richard Tiburzio, Ted Smith, Randall Bailey and Don Ross (hereinafter "Police Respondents"). The Petitioners asserted claims of deprivation of constitutional rights under the First, Fourth and Fourteenth Amendments and state law claims of false arrest, infliction of emotional distress, malicious prosecution, and assault and battery, (R.1: Complaint para's 1, 22, 24, 25, 27, 32, 35, 37).

On June 22, 1992 the Police Respondents filed a Motion for Summary Judgment (R.44: Motion) based upon sovereign immunity, qualified immunity, probable cause, and advice of counsel. On October 28, 1992 Petitioners filed their Memorandum Contra to the Police Respondents' Motion (R.50: Response). Thereafter, on November 6, 1992, the Police Respondents filed their

Reply to Plaintiffs' Memorandum Contra Defendants' Motion for Summary Judgment (R.55: Reply). On January 28, 1993 the District Court rendered its Opinion and Order (R.65: Memorandum, Opinion and Order; Petition at A-25) granting the Police Respondents' Motion for Summary Judgment on all of Petitioners' claims on the basis of sovereign immunity, probable cause and qualified immunity. On February 24, 1993 Petitioners filed a Notice of Appeal (R.71: Notice of Appeal) and on March 17, 1993 Petitioners filed an Amended Notice of Appeal (R.73: Amended Notice of Appeal).

On November 7, 1994 the United States Court of Appeals for the Sixth Circuit issued its decision reversing the District Court as to one claim against Respondent Tiburzio and affirming the District Court as to all other claims against the Police Respondents (Petition at A-2). On January 19, 1995 the United States Court of Appeals for the Sixth Circuit denied a petition for rehearing and a petition for rehearing en banc (Petition at A-1).

The facts of this case which relate to the Police Respondents have been summarized by the District Court on pages 1-5 of its Memorandum, Opinion and Order (Petition at A-25) as follows:

> Plaintiffs' claims against the Police Defendants arise from two separate incidents. The first occurred on October 24, 1988 at a Westerville School Board meeting. The second happened on October 29, 1988 at the corner of Schrock Road in Westerville.

A

The Westerville School Board held a meeting on October 24, 1988. The Board planned to discuss at this meeting a proposed school levy tax increase that was on the ballot of an upcoming local election. The plaintiffs, who were against the levy, attended the meeting. The Board hired defendant Tiburzio to be at the meeting to prevent a breach of peace between the pro- and anti-levy forces.

A local television station recorded the meeting, and a copy of the video tape has been submitted as a joint exhibit. The Court has viewed the tape in its entirety.

Plaintiffs Huffman, Rood, Hansen and Waggoner each attempted to speak during the meeting. Defendant Don Miller, the Board president, ruled that the plaintiffs were out of order on each occasion.

Huffman was the first plaintiff to seek to address the board at the October 24 meeting. Defendant Miller ruled him out of order. Huffman, however, continued to attempt to address the Board. Defendant Tiburzio then approached Huffman. He asked him to leave several times. Huffman voluntarily left with Tiburzio after several requests. Tiburzio informed Huffman as the two approached the chamber doors that he was placing him under arrest for disrupting a lawful meeting.

Plaintiff Rood next approached the podium and tried to address the Board. Board Defendant Miller ruled him out of order. Rood, however, persisted in speaking to the board in a loud voice.

Defendant Tiburzio then approached Rood and asked him to leave the chambers. Rood refused because he wanted to read something to the Board. Tiburzio then attempted to lead Rood out of the chambers, holding his arm. Rood repeatedly tried to pull away from Tiburzio. Rood shouted to Tiburzio, "get your paws off me" more than once. Tiburzio told Rood that he was under arrest for disturbing a lawful meeting as he led him away.

Police Defendants Bailey and Smith, both Westerville police officers, then arrived and joined Tiburzio. Tiburzio told Bailey and Smith that he had placed plaintiff Rood under arrest. Rood continued to try to walk away. Bailey and Smith attempted to hold Rood by his arms. Rood tried to pull away from them, thrashing his arms. In doing so, Rood bruised Bailey's left arm. Westerville Police Sergeant Jeffrey Jones then arrived on the scene. He started to handcuff Rood. Rood then ceased struggling. Sergeant Jones directed, upon Rood's request, that Bailey and Smith release Rood. Plaintiffs Huffman and Rood then went to the Westerville Police station without being handcuffed.

Back in chambers, plaintiffs Hansen, Ward, Waggoner, Sue Bresee, McIntyre and Bean all approached the podium. The Board ruled them out of order. Hansen and Waggoner, however, continued to try to address the Board. Tiburzio eventually approached the plaintiffs and asked them to leave the chambers. The plaintiffs complied and left without incident.

At one point, some unidentified police officers accidently knocked down plaintiff Brown.

Brown was not injured and acknowledges that the contact was not intentional.

B

The second incident occurred at the corner of State Street and Schrock Road in Westerville on October 29, 1988. Plaintiffs Carl Huffman and Jerry Bresee, as well as several unidentified persons, were at this location demonstrating against the tax levy.

Police Defendant Ross, a Westerville police officer, was on duty that day. Shortly after Ross reported for duty, Dispatcher Ande Pritchard issued a dispatch on a complaint that several individuals were creating a disturbance at the corner of Schrock and State Street by making obscene gestures and provoking remarks at passersby. The dispatch indicated that two members of Citizens Against Tax Waste, Pete Huffman and Gordon Rood, were possibly involved. Ross responded to the dispatch.

Police Defendant Ross arrived at the scene and approached the demonstrators. As Ross approached the group, he had his PR-24 baton in his right hand. Ross held his baton because he was concerned for his safety. His concern was based on his knowledge that Peter Huffman and Gordon Rood had recently been arrested and that several officers were required to effect the arrest.

Once he had approached the group, Ross asked to speak to Huffman and Rood. He also advised Carl Huffman and Jerry Bresee about the complaint he had received. Ross remained at the scene for another five to ten minutes. He

observed no activity to substantiate a disorderly conduct charge, and therefore left. The demonstrators continued their demonstration after Ross left. (footnotes omitted)

SUMMARY OF ARGUMENT

For the sake of clarity, the claims against the Police Respondents shall be addressed as three (3) separate incidents: (1) those claims against Respondent Ross alleging assault and battery against Petitioners Jerry Bresee and Carl Huffman; (2) those claims against Respondents Bailey and Smith alleging assault and battery against Petitioner Gordon Rood; and (3) those claims against Respondent Tiburzio alleging, *inter alia*, assault, false arrest and conspiracy against Petitioners Gordon Rood and Carl Huffman. Although the Court of Appeals makes reference to claims which had been brought against the City of Westerville, Ohio, those claims were voluntarily dismissed by Petitioners (R.54: Notice/Stipulation) and are not at issue here.

Although Petitioners seek review of the entire decision of the Court of Appeals, they make no mention of the claims against Respondent Ross and only briefly mention the claims against Respondents Bailey and Smith and present no argument that the decision of the Court of Appeals was in error as to any of these Respondents. Respondents submit that the decision of the Court of Appeals as to these Respondents was correct in law and fact.

Petitioners seek review of the decision as to Respondent Tiburzio by first drawing grossly improper inferences from facts in the record and then contending that these inferences also infer the existence of a conspiracy claiming that the Court of Appeals and the District Court failed to make all inferences in their favor thereby depriving them of their right to trial by jury.

Respondents submit that, after construing all proper inferences in favor of Petitioners, they still have not established the necessary elements of an actionable conspiracy and the decision of the Court of Appeals affirming summary judgment on behalf of Respondents was proper in law and fact.

With respect to Petitioners' claim that they were deprived of their Seventh Amendment right to a jury trial, Petitioners did not raise this issue below and, accordingly, it should not be considered by this Court. Furthermore, the law is well-settled that summary judgment does not violate a constitutional right to a jury trial. Therefore, review of this issue is unwarranted.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT ON BEHALF OF RESPONDENT ROSS.

The only claim against Respondent Ross is an alleged assault and battery on Petitioners J. Bresee and C. Huffman based upon the fact that he held a nightstick in his hand upon approaching these Respondents after having

been dispatched to their location on a complaint of a disturbance. No arrests were made, and when the officer did not observe anything improper, he left.

Citing to *Smith v. John Deere Co.*, 83 Ohio App. 3d 398, 406, 614 N.E. 2d 1148, 1154 (Franklin Co. 1993), the Court of Appeals noted that tortious assault in Ohio requires a willful threat or attempt to harm which reasonably places another in fear of harmful contact, coupled with a definitive act by one with the apparent ability to do the harm. As stated by the Court of Appeals, "[n]o reasonable trier of fact could find that the holding of a nightstick constituted an assault." (Petition at page A-9). Petitioners have not argued otherwise in their petition nor have they pointed to any inferences which would imply an actual threat or an accompanying definitive act as required to support a claim of an assault.

Further, Petitioners have not argued nor have they pointed to any inferences which would imply that Respondent Ross acted maliciously, recklessly, or in bad faith so as to defeat his immunity from liability under Ohio law. See Ohio Rev. Code § 2744.03(A)(6).

Respondents submit that the Petition to review the judgment of the Court of Appeals as to Respondent Ross should be denied.

II. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT ON BEHALF OF RESPONDENTS BAILEY AND SMITH.

The claims against Respondents Bailey and Smith involve the degree of force used by these officers in

effectuating the arrest of Petitioner Gordon Rood being asserted as claims of assault and battery under Ohio law and also raised under 42 U.S.C. § 1983 as a violation of Mr. Rood's Fourth Amendment right to be free of unreasonable seizures.

Noting that Petitioner Rood failed to offer any evidence to show that the officers acted maliciously, recklessly, or in bad faith, and that Rood himself admitted that he was a struggling arrestee, the Court of Appeals concluded that the officers were immune from liability on the state law claims by reason of O.R.C. § 2744.03(A)(6). (Petition at A9-10).

The Court of Appeals analyzed the federal excessive force claim under the "reasonableness" standard enunciated in *Graham v. Connor*, 490 U.S. 386 (1989) and held that "[n]o reasonable juror could find, under the circumstances presented here, that an arresting officer acted unreasonably by pulling an admittedly struggling suspect's arms behind his back and pushing him against a wall." (Petition at A-12).

The only mention in the Petition of Respondents Bailey and Smith is contained in one paragraph on page 6. Petitioners present no argument that the decision of the Court of Appeals in affirming summary judgment on behalf of these Respondents was in error, nor do they allege any factual inferences which were not accorded to Petitioner Rood.

Respondents submit that Petitioners have presented no basis to review the judgment of the Court of Appeals as to Respondents Bailey and Smith and that the Petition in this regard should therefore be denied.

III. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT ON BEHALF OF RESPONDENT TIBURZIO.

Petitioners have asserted a variety of claims against Respondent Tiburzio, under both state and federal law, in the nature of excessive force, false arrest, and conspiracy.

A. EXCESSIVE FORCE

The claims of excessive force against officer Tiburzio were discussed in conjunction with these same claims against officers Bailey and Smith since all of these claims arise from the same operative facts. Again, Petitioners have not argued that the decision of the Court of Appeals was in error nor have they pointed to any inferences of fact that were not drawn in their favor. Petitioners have presented no basis to review the decision of the Court of Appeals in this regard.

B. FALSE ARREST

As to the false arrest and malicious prosecution claims of Petitioners Rood and Huffman, the Court noted that under Ohio law the existence of a reasonable basis to believe that a crime has been committed is sufficient to defeat claims of malicious prosecution and false arrest, citing to *McFinley v. Bethesda Oak Hosp.*, 79 Ohio App. 3d 613, 607 N.E. 2d 936 (Hamilton Co. 1992); *State v. McCrone*, 63 Ohio App. 3d 831, 580 N.E. 2d 468 (Lorain Co. 1989); *Melanowski v. Judy*, 102 Ohio St. 153, 131 N.E. 360 (1921). (Petition at A-10).

Having reviewed the videotape which captured the events in question at the October 24 School Board meeting, the Court of Appeals noted that the conduct of Petitioners Rood and Huffman "unquestionably 'interfere[d] with the due conduct of [the] meeting' [such that] the existence of probable cause to arrest and prosecute both men for disturbing a meeting is beyond dispute." (Petition at A-11).

The Court of Appeals also concluded, as a matter of law, that probable cause existed to arrest and prosecute Petitioner Rood for resisting arrest as a result of Rood's conduct. (Petition at A-11).

Petitioners have not argued that this decision by the Court of Appeals is in error, nor do they assert that the Court of Appeals failed to draw any inferences in their favor as to these claims. Respondents submit that Petitioners have, therefore, waived these claims and the decision of the court below should not be disturbed.

C. CONSPIRACY

The gravamen of the Petition is the unsupported assertion that a conspiracy existed between Respondent Tiburzio and Respondents Husarik and Miller to violate the constitutional rights of Petitioners.

The District Court originally dismissed this claim finding "that the complaint does not fairly plead a conspiracy claim. More importantly, however, plaintiffs have adduced nothing more than unsupported innuendoes and conclusory allegations with respect to their conspiracy claim. The Police Defendants are entitled to summary

judgment in connection with plaintiffs' claim of civil conspiracy." (Petition at A-47).

Indeed, the three (3) claims for relief set forth in Petitioners' Complaint (R.1: Complaint) state simply:

> 35. Said acts by Defendants constitute violations of 42 United States Code Section 1983, and rights protected by the First, Fourth and Fourteenth Amendments to the United States Constitution.
>
> 37. Said acts by Defendants Don W. Miller, the Board, the Board members, Ernest A. Husarik and R. Tiburzio constitute false arrest and malicious prosecution under the law of Ohio as to Plaintiffs Gordon Rood and Carl Huffman.
>
> 39. Said acts by Defendants R. Tiburzio, T. Smith, R. Bailey, P. Ross and John Doe constitute assault and battery under the laws of Ohio.

As to "said acts" that are incorporated into these three (3) claims for relief, the Complaint simply alleges individual acts by individual Respondents with no allegation of fact as to a meeting of minds to obtain a single conspiratorial objective other than the conclusory allegation of paragraph 12 of the Complaint that the Board of Education, its members "and others" (?) worked in concert. *Moore v. City of Paducah*, 890 F.2d 831, 834 (6th Cir. 1989).

Even after discovery, Petitioners have been able to offer nothing more than the unsupported innuendoes and conclusory allegations of their counsel to support a conspiracy claim. As noted by the Court of Appeals in its decision (Petition at A-16):

> A complaint alleging a civil rights conspiracy must be supported by specific facts showing the "existence and scope of the alleged conspiracy." *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978). Nothing in the record of the case at bar supports a claim that the police conspired in any way to deprive the plaintiffs of their constitutional rights. Summary judgment was proper as to the police defendants and the City of Westerville on the claim of civil conspiracy.

Petitioners did not meet their burden under F.R. 56(e) of adducing significant probative evidence to support the claim of conspiracy [*Collins v. Walden*, 613 F.Supp. 1306, 1317 (D.C. Ga. 1985)] and instead rely upon the imagination of their counsel to create a conspiracy; but, as stated by the court in *Holderman v. Consolidated Rail Corp.*, 649 F.Supp. 1188, 1196 (N.D. Ind. 1986), a party may not "merely cry 'conspiracy' and throw itself on the mercy of the jury" nor avoid summary judgment by hopeful reliance on "snippets" of deposition testimony.

No Petitioner has provided a factual basis for a conspiracy between any Board Respondent and any Police Respondent, nor is their support for such a theory in the deposition testimony of any Respondent. The only support comes from the speculation of Petitioners' counsel with his imagined Lamont Cranston ability to know what evil lurks in the hearts of men. But, as stated by the court in *Love v. King*, 784 F.2d 708, 711 (5th Cir. 1986), "such inferences must be 'within the range of reasonable probability.' When the necessary inference is so tenuous that it rests merely upon speculation and conjecture, it is the duty of the court to withdraw the case from the jury."

As an example of the misstated deposition testimony and improper inferences from which Petitioners attempt to create a conspiracy where none existed, Petitioners first claim "that the Westerville Board of Education (acting primarily by and through Board President Don Martin and Superintendent Ernest Husarik) and the Westerville Police Department (acting primarily by and through officer Tiburzio) conspired to deprive the Petitioners of rights guaranteed under the First and Fourth Amendment to the United States Constitution." (Petition at 10). This statement conveniently ignores the fact that Petitioners voluntarily dismissed the City of Westerville from this litigation (R.54: Notice/Stipulation), and the Westerville Police Department was never named as a party.

Petitioners accuse Respondent Tiburzio of "alter[ing] the facts at his deposition to reflect a scenario that was consistent with that of the Respondent School Board." (Petition at 14, fn. 14), which ignores the fact that the sole deposition of Tiburzio was prior to the deposition of any school board member.

The "altered facts" imagined by Petitioners involve Respondent Tiburzio's deposition testimony that when he spoke with Dr. Husarik to find out what his function as a special duty officer at school board meetings would be, he first testified that he was told " . . . to make sure that there were no problems between the proponents, or the people that were for a school levy, and those against a school levy. And that was it." Later in the same deposition he testified, "*I believed* that if there were any problems, they would let me know, and nothing was ever said as to how or what." (Emphasis added.) (Petition at 13, fn.

14.) The fact that the officer made an assumption beyond what he was actually told hardly constitutes altering the facts, nor does it even imply a conspiracy.

Petitioners further attempt to allude to a conspiracy by claiming that Dr. Husarik testified that he did not meet with Respondent Tiburzio before the school board meeting while Tiburzio testified that they did meet.[1]

What Petitioners do not tell this Court is that Dr. Husarik testified that he did not meet with officer Tiburzio prior to the October 24, 1988 Board Meeting (R.45, Ex.2: Husarik at 8) and Tiburzio also testified that he did not meet with Dr. Husarik prior to the October 24 meeting, but only prior to the first time he worked special duty at the meeting in mid-September. (R.*: Tiburzio Depo at 61, 73-75).

Petitioners also find evidence of a conspiracy between the school board and the police in the fact that both Husarik and Tiburzio used an identical term, i.e. "remove" in describing what Tiburzio did with Petitioner Rood when he disrupted the meeting. (Petition at 15, fn. 16). How flimsy is Petitioners case when they argue that the Court of Appeals failed to draw an inference of a conspiracy in their favor from the fact that the Respondents all speak the English language!

In defining a civil conspiracy, the Sixth Circuit Court of Appeals held:

---

[1] Even if this misstatement of testimony were true, it would directly contradict Petitioners slanderous assertion that officer Tiburzio altered his testimony to be consistent with that of the school board.

> "A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. . . . All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant." *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985).

While the fact that certain of the Petitioners may have been removed from the October 24, 1988 school board meeting may be termed an overt act, Petitioners have presented no evidence whatsoever to support any of the other elements necessary to prove a conspiracy between the Board Respondents and the Police Respondents.

There is no evidence of a single plan between the police and the school board. There is no evidence that the police shared a general conspiratorial objective with the school board.

There is no evidence of any meeting or conversation between anyone on the school board and anyone in the police department other than one brief conversation between Dr. Husarik and officer Tiburzio on or about September 12, 1988 in which Tiburzio inquired as to his duties and was advised that he was to maintain order.

Prior to this brief meeting, there was no contact between Tiburzio and anyone on the school board. Tiburzio had simply signed up to work a special duty job and was advised by his supervisor that he was to work in plain clothes and that the job consisted of maintaining peace and order.

Prior to the October 24, 1988 board meeting, officer Tiburzio did not know any of the Petitioners other than Mr. Rood to whom he had been introduced once years before; nor had he ever met any of the Board Respondents other than his one brief conversation with Dr. Husarik on September 12, 1988.

If a conspiracy existed (and there is no evidence to support such a claim), it certainly did not involve officer Tiburzio.

There was no single plan or general conspiratorial objective known by officer Tiburzio to prevent opponents of the tax levy from speaking because there was an essentially equal number of pro-levy and anti-levy speakers.

There was no single plan or general conspiratorial objective known by officer Tiburzio to prevent members of CATW from speaking because some members of CATW did speak and Tiburzio did not even know who was in that group.

There was no single plan or general conspiratorial objective known to officer Tiburzio to prevent the leaders of CATW or even certain specific people from speaking because Tiburzio did not know who any of the alleged leaders were and did not know any of the individuals removed from the meeting prior to that time other than Gordon Rood.

Quite simply, there is no evidence whatsoever to support the existence of the necessary general conspiratorial objective necessary for a claim of conspiracy involving officer Tiburzio.

Further, there is no evidence whatsoever that there was an agreement involving officer Tiburzio to perform an unlawful act. The arrest of Petitioners Rood and Huffman was *not* unlawful.

The incident in question was captured on videotape which was reviewed by the Court of Appeals which stated: "Our review of the videotape of the meeting persuades us that the existence of *probable cause* to arrest and prosecute both men for disturbing a meeting *is beyond dispute.*" (Petition at A-11, emphasis added.)

Further, upon a petition for rehearing en banc, all active judges of that court had an opportunity to review the videotape but they declined to disturb the decision of the original panel.

Petitioners attempt to argue that there was no probable cause for these arrests because officer Tiburzio exercised no independent judgment and simply followed instructions from Dr. Husarik. (Petition at 23-25.) This again is a gross misstatement of the facts in evidence.

Officer Tiburzio testified that no one told him to arrest Rood or Huffman and that that decision was solely his own. (R.*: Tiburzio Depo at 62). Someone from the school board may have motioned to the officer when the board was no longer able to control the meeting, but the decision to arrest was made by officer Tiburzio when first Huffman and then Rood refused to desist and leave the podium when the officer requested that they do so. In the case of the individuals who did desist and leave, the officer decided that no arrests were warranted.

Even if there were evidence that a conspiracy existed between two or more members of the school board, there is no evidence that officer Tiburzio, or any other Police Respondent, shared the "general conspiratorial objective" of intentionally disrupting Petitioners' First Amendment rights. Indeed, there is no evidence that warrants even an inference of unlawful motive in officer Tiburzio carrying out what may reasonably be viewed as routine law enforcement activity. *See Hobson v. Wilson*, 737 F.2d 1, 52-53 (D.C. Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 1843, 85 L.Ed. 2d 142 (1985).

Further, as to a claim of civil conspiracy brought pursuant to 42 U.S.C. § 1983, officer Tiburzio is entitled to the defense of qualified immunity. *See Hampton v. Hanrahan*, 600 F.2d 600, 634-635 (7th Cir. 1979), *cert. denied in part, granted in part and rev'd on other grounds*, 466 U.S. 754 (1980). It has already been established that officer Tiburzio had ample probable cause for his actions. Further, while it may have been well established law at the time of the incident in question that members of the public had a right to attend a public school board meeting [*See Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167,176 (1976)], it was also well established that government may place limitations on the time, place and manner or access to such forums. *See Perry Educational Ass'n v. Perry Local Educations' Ass'n*, 460 U.S. 37, 45-46 (1983).

In light of existing case law in Ohio upholding the right of a village council to eject a disruptive individual from council chambers, it cannot be said that officer Tiburzio violated clearly established law in removing the

disruptive Petitioners from the school board meeting. In *Kalk v. Woodmere* the court stated:

> The evidence presented to the trial court . . . clearly showed that appellant was in fact detained, touched and ushered out of the meeting. Our review of the record, however, shows that this ejectment did not rise to the level of constitutional violation of appellant's liberty. As stated above, the council had the right to have appellant removed from the meeting since he was creating a disturbance. 27 Ohio App. 3d 145, 149 (1985).

Finally, the actions of officer Tiburzio in effecting the arrest of Petitioners Rood and Huffman and in ejecting other Petitioners from the podium must be reviewed under the Fourth Amendment's reasonableness standard.

Although normally cited, as it was by the Court below, in reviewing instances of alleged excessive force, the decision of this Court in *Graham v. Connor*, 490 U.S. 386 (1989) discusses the standard to be applied in instances alleging a violation of the Fourth Amendment's prohibition against unreasonable seizures of the person and, although Petitioners claim that there was a violation of their First Amendment rights at the October 24, 1988 school board meeting, the operative act of officer Tiburzio was a "seizure" as would be governed under the Fourth Amendment.

As stated by the Court in *Graham*:

> The 'reasonableness' of a particular [seizure] must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . . The calculus

> of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving . . . . *Id.* at 396-97 (citations omitted).

In the instant action, officer Tiburzio was working a special duty assignment at a school board meeting with the assigned duty of simply keeping order, which is essentially the duty of a police officer in any event.

As shown in the videotape of the October 24, 1988 meeting, the meeting proceeded in an orderly, one might even say "uneventful," fashion for the first one hour and 26 minutes. Then bedlam erupted. Just taking the factual scenario set forth in the Petition, the following events confronted officer Tiburzio over the next *fifteen minutes*:

1. Respondent Huffman creates a disturbance, is ruled out of order, but refuses to leave the podium necessitating action by Tiburzio. Huffman continues to refuse to desist and eventually is led from the room and placed under arrest.

2. No sooner does Tiburzio get Huffman into the hallway than Petitioner Rood begins shouting, is ruled out of order, but refuses to desist. Tiburzio reenters the room to speak to Rood who refuses to desist and pulls away from the officer after being placed under arrest. Rood and Tiburzio eventually proceed to the hallway where Tiburzio advises two other officers who have just arrived that Rood and Huffman are under arrest.

3. A struggle ensues between Rood and the two officers at the same time as a large

group of people exit the meeting room placing Tiburzio in fear of further confrontations in the hallway.

4. No sooner is order restored in the hallway than Petitioner Hansen approaches the podium, is ruled out of order, but refuses to desist necessitating officer Tiburzio's return to the podium. Fortunately, Hansen did desist when requested to do so by Tiburzio.

There can be no doubt that officer Tiburzio was forced to make split-second judgments in a situation that was tense, uncertain and rapidly evolving. Viewing the actions of officer Tiburzio from the perspective of a reasonable officer on the scene it certainly cannot be said that any of his actions were unreasonable under the circumstances.

Respondents submit that the decision of the Court of Appeals in upholding the District Court's dismissal of Petitioners' conspiracy claim was correct in law and fact and should not be overturned on appeal. Petitioners have presented absolutely no facts to substantiate, even by inference, the existence or scope of a conspiracy between the Police Respondents and the Board Respondents, nor have they presented any facts, even by inference, of an unlawful act by the Police Respondents.

IV. THIS CASE PRESENTS NO QUESTION OF VIOLATION OF PETITIONERS' RIGHT TO A JURY TRIAL

Petitioners also insist that this case presents the question whether "the Court of Appeals" deprived Petitioners of their Seventh Amendment rights when it did not allow

a jury to consider the case. (Petition at 28.) In their Petition, Petitioners specifically state that their grievance on this point is with the Court of Appeals for the Sixth Circuit. (Petition at 29.) Petitioners have failed to present an issue that merits review.

A. PETITIONER FAILED TO RAISE THE ISSUE BELOW

First, the district court (and not the Court of Appeals for the Sixth Circuit) granted summary judgment in favor of Respondents and thereby precluded Petitioners from presenting their case at a jury trial on the merits. Petitioners did not raise to the appellate court, and the appellate court did not pass on, any assertion that Petitioners somehow had been deprived of a right to a jury trial, strongly militating against review of the issue by this Court. (*See Patrick v. Burgett*, 486 U.S. 94, 99 n.5 (1988); *City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989)). Despite Petitioners' lengthy argument, Respondents can not comprehend how the Court of Appeals for the Sixth Circuit deprived Petitioners of a jury trial that had been obviated, without subsequent complaint for deprivation of their constitutional rights, in the district court.

B. THE LAW IS WELL SETTLED THAT SUMMARY JUDGMENT DOES NOT VIOLATE CONSTITUTIONAL RIGHTS

Second, Petitioners cite no authority and Petitioners have no authority for the proposition that a grant of summary judgment (or, in the case here of the Court of

Appeals for the Sixth Circuit, affirmance of a lower court's grant of summary judgment) violates a constitutional right to jury trial. To the contrary, it is well settled that when summary judgment has been properly granted, no jury trial issue arises under the Seventh Amendment to the United States Constitution. *See Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1447 (9th Cir. 1987); *Itel Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1261 (11th Cir. 1983); *Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir. 1980); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974); *United States v. Strangland*, 242 F.2d 843, 848 (7th Cir. 1957). Accordingly, Petitioners should not be granted review of this case on the basis that they were deprived of a jury trial. Little purpose would be served by this Court entertaining review of a matter of well-settled law on which the federal appellate courts (as well as the state courts and federal district courts) are in agreement.

This Court recently touched upon the very jury-trial issue raised here by Petitioner in *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986):

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex, 477 U.S. at 327.

As the *Celotex* Court recognized, a party's right to have genuine issues of material fact tried by a jury is not

violated by summary judgment. Petitioners have no constitutional right to present claims lacking any factual basis to a jury.

CONCLUSION

Petitioners have failed to show any conflict between the decision of the Court of Appeals for the Sixth Circuit and prior decisions of this Court or of any other federal court. Petitioners have failed to show any other basis for this Court to hear this case. The decision of the Court of Appeals for the Sixth Circuit is consistent with applicable law and does not warrant review on any grounds. Respondents respectfully request that Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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(4)

No. 94-1696

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MAUREEN HANSEN, *et al.*,

Petitioners,

v.

WESTERVILLE CITY SCHOOL DISTRICT, BOARD OF EDUCATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. ERRORS IN THE FACTS

The brief set of facts supplied to the Court by the Respondents has numerous errors - some small, some significant. All cannot be addressed in the space permitted, but Petitioners do choose to reply specifically to two and will mention several others.

A. THE EVENTS IN THIS MATTER BEGAN BEFORE SEPTEMBER 12, 1988

In the Brief in Opposition the Respondents allege that "(t)he events relevant to this Petition began at a public meeting of the Board on September 12, 1988..." It is indicative of the contest in this case (and most others) that both sides have a perspective. However, it is one thing to state the facts in a manner most favorable to your point of view, it is quite another to leave out, ignore, or misstate facts (either intentionally or unintentionally) in order to create an impression that is clearly at odds with the actual situation.

It should be clear from the arguments and the record in this matter that "the events relevant to this Petition" did not begin on September 12, 1988. The demonstrable events relevant to the Petition herein began the evening of May 27, 1988 - three and one half months earlier that stated by Respondents. May 27, 1988 was the date that Margaret McIntyre[1] (assisted by her son and his girlfriend) was handing out leaflets at the Blendon Middle School in Westerville, Ohio when she was accosted by Respondents Husarik and Hayfield.

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[1] Margaret McIntyre was one of the original Plaintiffs below. She passed away after this case was initiated. Her husband Joseph McIntyre, who is the Executor of her estate, has been substituted as a party herein.

She was told to leave the school grounds[2] and threatened with arrest if she did not comply. Additionally, Respondent Hayfield confiscated some of her leaflets by taking them out of the hands of her son's girlfriend.

Numerous other events[3] took place in that three and one-half month period that are germane to the Petition and the underlying case. These events demonstrate not only the Board's adamant pro-levy position, but it's willingness to use its power and authority to stifle those who oppose its edict. Petitioners believe that this improper use of a position of public trust by those Respondents who are supposed to be "neutral" in their use of authority, is not only an abuse of discretion, but an unwarranted attack on the Constitutional rights of Petitioners and others who disagreed with their point of view.

If the Court were to accept the view of Respondents, then Petitioner Rood's protest at the Board meeting of September 12, would be viewed in a vacuum that would leave

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[2] Respondent Hayfield told Mrs. McIntyre that the leaflets she was distributing were illegal because they did not comply with Ohio Revised Code § 3599.09. Approximately a year late, in March of 1989, Assistant Superintendent Hayfield filed a complaint against Mrs. McIntyre with the Ohio Elections Commission. Eventually Mrs. McIntyre was fined $100.00 by the Commission and contested the constitutionality of the underlying Ohio statute. This Court decided that statute's constitutionality in *McIntyre vs. Ohio Elections Commission*, Case No. 93-986, Decided April 19, 1995.

[3] The use of school facilities by the pro-levy groups. The defeat of two previous levies that year by those opposed to their passage, including the CATW group, many of whom were Plaintiffs below. The refusal by the Board of Education to allow anti-levy groups the same access to, and use of, public school property to display their anti-levy propaganda as the Board had given to the pro-levy groups.

the reader with no understanding of the reasons behind Petitioner Rood's complaint. He would appear to be the person the Respondents have depicted - a demanding citizen who yells and paces about with no purpose other than to disrupt the lawful meeting of the School Board; a base, undesirable lacking sufficient reason to justify his actions. If that picture of Petitioner Rood were accurate, it is highly improbable that Judge Richard Sheward, would have found him not guilty of "disturbing a lawful meeting" and/or "disorderly conduct" based on the judge's review of the videotape of the September 12, 1998 meeting (Joint Exhibit 1 in the courts below) and the Board's own published Agenda for that evening. (Judge Sheward's decision was included as pages 872-894 in the Joint Appendix below).

Respondents' inaccuracies in the facts do not stop with their failure to recognize events that took place prior to September 12, 1988 (which by itself might simply be considered a respondent perspective). There are many others.[4]

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[4] *A.* Respondents' suggest that when Petitioner Hansen attempted to address the Board on September 12, 1988, "(t)he presiding officer at the Board meeting permitted her to complete her remarks." Page 2 of Brief in Opposition. This is inaccurate. She was permitted to continue by Superintendent Husarik. He was not the "presiding officer." The "presiding officer" was Board President Don Miller.

B. On Page 3 of their Brief in Opposition, Respondents state that at the October 24, 1988 meeting "Dr. Miller also reiterated the ground rules for participation." Presumably the "ground rules" refers to the fact that there would be 45 minutes allotted for public comment and that each speaker would be permitted no more than five minutes to speak. Respondent Miller did not reiterate the ground rules that night. (R. 44, Jt. Ex. 2).

C. On Page 3 the Respondents refer to "...a new public participation policy which opened the floor for public comment for forty-five minutes and required those in attendance to state their desire to speak on a sign-up sheet available prior to the meeting." The "sign-up sheet" was a "new

Most may be considered small, relatively inconsequential errors, but the totality of the mistakes changes the view one receives of the events in question and certainly colors the truth.

B. THERE WAS NO SEPTEMBER 12, 1988 "MEETING"

Respondents on Page 18 state that "Officer Tiburzio testified that the only 'meeting' he ever had with a Board member was a brief conversation immediately prior to the September 12, 1988 meeting, which was before the change in the public participation policy." (Emphasis in quote in Brief in Opposition.) They cite Pages 61 and 73-75 of Respondent

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rule" created by Don Miller and imposed on October 10, 1988. It was not a "new public participation policy" approved by the Board. The forty-five minute time frame, on the other hand, was not new. It had been used before. It was the same time-frame that was in existence during the September 12, 1988 meeting. (R. 44, Jt. Ex. 1).

D. On Pages 4 and 11 Respondents refer to Del Waggoner as a "Petitioner." Del Waggoner is neither a Petitioner nor has he ever been a Plaintiff below.

E. On Page 4 Respondents state that "(b)oth in and outside the auditorium, Petitioner Rood struggled with Officer Tiburzio..." This statement is incorrect. There is no indication anywhere in the record that Officer Tiburzio had any contact with Petitioner Rood outside of city counsel chambers.

F. Respondents state on Page 5 that "(a)fter the Petitioners returned from the foyer, the final speaker recognized by the Board, Jack Sandman, was completing his statement. At that time, despite the announcement that the public comment period was closed, Petitioner Hansen approached the podium, began to speak, and refused to yield despite being ruled out of order." In reality, Petitioner Hansen did approached the podium, a considerable time after Jack Sandman had completed his statement, not as he "was completing his statement." In fact, there was an interim discussion by the Board that took a couple of minutes once Mr. Sandman stopped talking, before Mrs. Hansen stood and asked for additional time to address the Board. R. 44, Jt. Ex. 1.

Tiburzio's Deposition for support of this statement. However, no place in the material cited does Tiburzio suggest that he spoke with Dr. Husarik as far back as September 12, 1988. Quite the contrary. Tiburzio indicated that he contacted Dr. Husarik the first night he reported for duty at a school board meeting. (Tiburzio Depo. at 75, lines 13-15.) Tiburzio did not say what the date was of that meeting. He did not remember. He only knew it was the first night he reported for duty.

Respondent Tiburzio was asked in deposition if he was at the September 12, 1988 meeting, and if he escorted Mr. Rood out of that meeting. His response was as follows: "I never escorted Mr. Rood out of any other meeting [other than the October 24, 1988 meeting]." Tiburzio Depo. at 64, lines 5-6. Tiburzio simply was not at the September 12, 1988 meeting. R. 44, Jt. Ex. 2.

II. ARGUMENT CONSIDERATIONS FROM THE BRIEF IN OPPOSITION

Petitioners have set forth their arguments for the granting of a writ in their Petition and do not desire to repeat them here simply because Respondents have offered contrary explanations. However, there are three points raised by the Respondents to which Petitioners wish to reply.

A. TIBURZIO'S DISCUSSION WITH HUSARIK

It is clear from Tiburzio's deposition that he had a conversation with Ernest Husarik in which the two discussed Tiburzio's duties at the school board meetings. (See Petition at Pages 13, *et seq.*) Respondents allege that Respondent Tiburzio's "testimony is perfectly consistent with that of Dr. Husarik, who stated that he had not spoken with Officer

Tiburzio prior to the October 24, 1988 Board Meeting." Page 19 of Brief in Opposition.

Petitioners are at a loss to understand how Respondents find no inconsistency in that statement. Perhaps it revolves around their mistaken belief that the conversation between Respondents Husarik and Tiburzio took place just prior to the September 12, 1988 meeting and that the word "prior" in Husarik's statement meant only "immediately before" the October 24, 1988 Board meeting and not a day before, or a week before or longer. Respondents even accuse Petitioners of "misstating the record" by "Petitioners' attempt to impute the brief discussion before the September 12 meeting to the October 24 meeting..." Page 19 of Brief in Opposition.

There is no evidence to suggest a meeting or "conversation" between Respondents Husarik and Tiburzio before the September 12, 1988 School Board Meeting, but, if such a conversation took place, it would support Petitioners' theory since it would tend to show Respondents' attempt to gain tighter control over speakers even before a supposed reason for doing so existed.[5]

B. THE THEORY OF CONSPIRACY

Respondents suggest that Petitioners' theory of conspiracy requires a chain of events over which Respondents had no control. Page 21 of Brief in Opposition. Petitioners' point is that Respondents were in complete control and had planned for the two most obvious contingencies - one, that the

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[5] The protest by Petitioner Rood on September 12, 1988 could arguably be cited by Respondents as a basis for instituting new or additional controls (i.e. new rules). Absent that protest, there appears to be little reason in the record for a concern that the meetings might become difficult to manage.

Petitioners would not protest the Board's unfair rulings which kept the CATW leaders from having an opportunity to speak, or, two, that they would. If Petitioners did not protest, then the Board could control or stack this very important meeting with those speakers they desired, without any opposition. If Petitioners did protest, the Board was in a position to discredit them. It is a very simple theory which is supported by reasonable and legitimate inferences from the facts coupled with the denials and contradictions in the testimonies of Respondents Husarik, Tiburzio and Miller.

Why did Dr. Husarik insist that there was no meeting between he and Officer Tiburzio? Such a meeting would certainly not have been unusual. Even what Officer Tiburzio indicated that Dr. Husarik told him was not necessarily out of the ordinary. What was out of the ordinary was the denial by Respondent Husarik that the meeting or conversation ever took place. What was out of the ordinary were the statements by Officer Tiburzio that described what Dr. Husarik wanted done with Petitioners Huffman and Rood. (See Footnotes 15 and 16 in the Petition at Page 14.)

What was out of the ordinary was Respondent Miller's "new rule" at the October 24, 1988 that gave preference to those who had not spoken before. That "new rule" effectively eliminated an opportunity for the three anti-levy speakers (Petitioners Huffman, Rood and Hansen) that Respondent Don Miller had recognized on his own personal notes (prepared before the meeting) to be the most probable anti-levy participants, from speaking. That same "new rule" curiously allowed virtually everybody listed in Don Miller's notes as pro-levy speakers, an opportunity to be heard in Respondent Miller's pre-determined order. (See Don Miller's Notes at Page A-59 of Petition Appendix.)

What was out of the ordinary was Don Miller's trial testimony which demonstrates that he had an understanding of what was to happen when Officer Tiburzio entered the council chambers after being summoned in by Dr. Husarik. (See Footnote 17 in Petition beginning on Page 15.)

Nor does Petitioners' theory of conspiracy rely on "their proclivity for disruptive behavior" as alleged by Respondents. The only "proclivity" Petitioners had was their proclivity to exercise their First Amendment rights. That proclivity was well known by the Respondents but not appreciated because Petitioners were on the "wrong" side.

C. THE SIXTH CIRCUIT'S SUMMARY JUDGMENT STANDARDS

Respondents argue that because Petitioners do not disagree with the basic summary judgment standards enunciated by the Sixth Circuit Court of Appeals, that there is nothing in the lower court's ruling that is defective or inconsistent with the decisions of this Court and the granting of a writ would be inappropriate. Petitioners, of course, do believe that the decision of the court below recited the proper standards. The quarrel of the Petitioners, as delineated in their Petition before this Court, is clearly over the application of those standards.

Even where the standard quoted is correct, the incorrect application may cause an untoward result. If nothing is done to right an incorrect application, it will be used indiscriminately over and over again to bring about multiple injustices in a myriad of situations.

Petitioners believe that the facts in this case do not simply represent an academic or episodic set of circumstances

that have no important overtones for future determinations by courts throughout this country. Quite the contrary, the failure by any court to properly consider all of the facts in any situation or to make a ruling based on any incorrect assumption or an incomplete consideration of the facts and the circumstances, causes irreparable harm, not only to the parties involved (and disproportionately to plaintiffs), but to the system of justice itself and the rights of citizens everywhere to significant Constitutional guarantees. Petitioners maintain that the facts in this case speak more poignantly in favor of the granting of a writ of certiorari than those in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

III. CONCLUSION

For the reasons delineated in the Petition and hereinabove, Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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